REGARDING VENUE

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2419

A BILL TO AMEND TITLE 28, UNITED STATES CODE, REGARDING VENUE, AND FOR OTHER PURPOSES

MAY 13, 1982

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REGARDING VENUE

THURSDAY, MAY 13, 1982

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 1:35 p.m., in room 2228 of the Dirksen Senate Office Building, Senator Alan K. Simpson (acting chairman) presiding.

Present: Senators Simpson, Mathias, DeConcini, Leahy, and Baucus.

Staff present: Boyd Hollingsworth, Robert Fiedler, Ralph Oman, Robert Cynkar, John Podesta, Sarah Schubert, Mary Troland, Arthur Briskman, and Sally Rogers.

OPENING STATEMENT OF SENATOR ALAN K. SIMPSON

Senator SIMPSON. The hearing will come to order. The hearing today is on S. 2419, introduced by Senator DeConcini. It would amend title 28 of the United States Code as it regards venue, particularly in cases where the Federal Government is the defendant party in Federal district court, or where a Federal agency action is reviewable in the district courts of appeal.

I think the question of venue in actions involving the Federal Government is an issue that has been before the Congress for a good while indeed. Certainly in my tenure here of little more than 3 years, there has been considerable discussion of venue and a number of bills have been introduced in this area. Concern over centralization of the judicial process through restrictive venue requirements is what led to the enactment of the Venue and Mandamus Act of 1962.

Rather than go through an extensive history of the issue, I would refer you to the introduction of a booklet entitled "Venue at the Crossroads," published by the National Legal Center for the Public Interest. That introduction was by my colleague and friend, Senator Dennis DeConcini, and it is a complete discussion of the recent congressional history of the issue of venue. I commend it to you; it has an excellent presentation of both sides of this complex issue. The National Legal Center is to be commended for providing a forum for this discussion and for making this publication available to all Members of the Senate to aid us in consideration of venue legislation. There may be copies here for those who wish to have them.

Well, without overly burdening the record of today's hearing, I would also note that in the last Congress there was another hearing on venue legislation that had been introduced by Senator

Laxalt and Senator DeConcini. That hearing was held before the Subcommittee on Improvements in Judicial Machinery on February 20, 1980, and the record of the hearing was printed as serial number 96–78, entitled "Federal Venue Statutes." Much of the testimony and submissions at that hearing, some of it by witnesses who are with us today, remains relevant to consideration of the current legislation, and rather than reprint any of that material I simply suggest that, if there are no objections, the record of that prior hearing be incorporated by reference in today's proceedings without any further printing cost.

Let me commend the very able Senator from Arizona for introducing the legislation. He and I along with many others have for some time shared a concern that the current venue provisions raise significant questions about the efficiency of our judicial system and the ability of individuals to effectively participate in the judicial process. The failure to adequately consider the impacts of challenges to Federal agency actions in deciding where a lawsuit should be heard is an omission that has given rise to this proposal.

I thank the Senator from Arizona for his activity in this area and recognize him at this time for any statement.

STATEMENT OF SENATOR DENNIS DeCONCINI

Senator DECONCINI. Mr. Chairman, thanks also go to you for holding the hearings today on 2419, for being a leader, and for having introduced the legislation. It has been enjoyable for me to work with you in formulating this particular bill as a cosponsor along with Senator Laxalt, and many others.

It's no secret that I strongly endorse the principles embodied in 2419. Simply stated, the bill stands for the principle that a case should be tried in a forum that has the most immediate relationship to the matter before the court.

Judge Thomas Flannery of the U.S. District Court for the District of Columbia stated 2 weeks ago, in the *Salt River Pima-Maricopa Indian Community* v. *James Watt* case involving water rights in my home State of Arizona—and I quote: "The public interest dictates that trial proceed in the jurisdiction with the most pressing connection to a particular dispute." In this unusual 7-page memorandum opinion granting a motion to transfer venue from the District of Columbia to Arizona, he concluded with what I would have hoped is a truism, namely that—and again quoting: "The interests of justice are ordinarily served by having a court familiar with local circumstances and local jurisprudence resolve matters of uniquely local concern."

This echoed the words of Justice Jackson in *Gulf Oil Corp.* v. *Gilbert* in 1947, when he said—and I quote again: "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only."

This holds just as true today and represents a principle that cannot be dulled by time.

Our present venue laws do give the courts the ability to transfer cases, such as Judge Flannery did in the *Salt River* case. Unfortunately, not all our judges are as perceptive and as willing to exer-

cise their authority as was Judge Flannery. I make no claim that vast numbers of cases are filed in inappropriate jurisdictions and then cannot be transferred. I simply believe we need even stronger guidelines for our Federal judges concerning venue so that we will not have to rely on their unguided discretion to transfer cases in circumstances such as the *Salt River* case, the *Ruby Lake* case, and the *Foothills Water Project* case. These were all cases which were clearly misfiled in jurisdictions far removed in impact and geographically from where they should have been filed.

I believe our judges in Arizona are fully qualified to hear any case that may come before them, and it would be a slur to suggest that they could not objectively decide cases that happened to impact the State of Arizona.

I believe we must create a system of venue laws designed not to accommodate the Washington lawyers, the Washington interest groups, and the Federal bureaucrats, but a system designed to make it as feasible as possible for people affected by the hand of the Government to see and to participate in matters touching their lives.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you, Senator DeConcini. And another Member of the panel today, is very actively interested in this issue, bringing a great deal of background as a practicing attorney, and prosecutor, having been involved in venue matters, Senator Leahy of Vermont.

STATEMENT OF SENATOR PATRICK J. LEAHY

Senator LEAHY. Thank you, Mr. Chairman, I appreciate that. I would ask that my full statement be made a part of the record, but if I might, I'd like just to summarize a couple of points in it.

Senator SIMPSON. Please do.

Senator LEAHY. It's good that we are having these hearings, because venue is a functional and practical concept, it is not properly a political one. I can think of no better way to consider the merits of venue-shifting legislation than to open the record for testimony and prepared statements from members of the bar, the academic community, and others who are particularly learned, experienced or familiar with venue, both as a concept and as a practical matter.

And I commend the chairman in making the record available for this.

I think—and I must say I am afraid that when we look at that record, it will be one of the few times where I may disagree with some of my good friends—yourself and Senator DeConcini—that S. 2419 and other similar proposals may well be the result of popular rhetoric gone awry. A number of people have continued to pursue venue reform in this Congress, despite the absence of any data from the Administrative Office of the U.S. courts which would indicate that a problem with the current venue and change-of-venue provisions even exists.

Venue has been governed over the last 20 years by well-settled principles favoring a functional choice of forums for the parties and the courts.

Any effort to revise or amend the Federal venue statutes should focus on efforts to improve the fairness and the efficiency of the judicial machinery and to better serve the convenience of the parties and the traditional right of the plaintiff to select his forum.

But I think the changes here far exceed fine tuning or revision. They would apply to any case brought by any plaintiff against any Federal defendant in any Federal court across the country. It would not be sufficient to elect a forum where the plaintiff or defendant resided or where the action arose. That jurisdiction would only pass muster if the residents were "substantially affected," and the government could therefore move to change venue any time it suited its convenience.

I think placing the choice as to where a lawsuit should be tried in the discretion of the government defendant is, in fact, a disservice to all those who might wish to sue the Government. I think it's a "Big Government" measure when you look at it in that light.

The costs in time, in inconvenience and, in part and judicial resources all serve to discourage legal proceedings against the Federal Government. This bill would override the venue provisions in existing legislation, even where earlier Congresses have made special provisions for venue, based on the nature and special needs of particular statutes. That really concerns me.

I think the bill would undermine its own solution to the race-to-the-courthouse problem that now arises where multiple proceedings on the same agency order are instituted in more than one circuit.

I do believe, however, that two concerns raised by the proponents of this bill—issues of notice and ability to participate—are legitimate and should be addressed.

In the views which I submitted on previous proposals by the distinguished chairman and my distinguished friend, Senator DeConcini proposals which were much narrower—I had no objection to, and, in fact, supported, provisions which would have heightened the courts' sensitivity to local impact in cases where the venue issue was raised. I also supported provisions for insuring that States which are affected by an environmental action would have adequate and timely notice that a case has been brought in another judicial district. Those procedures required a plaintiff to forward a copy of his complaint to the attorneys general of up to 5 States potentially affect.

But aside from these points, I think S. 2419 is a step backward to the days of rigid venue formulas and favoritism to Federal defendants.

I think that the hearings we are having here are important. I would also like to state my own appreciation, as I have before, to the proponents of this bill for holding it until this time, rather than adding it to the regulatory reform bill, S. 1080, even though they would have been perfectly within their rights to have brought it up at that time.

Let me state, Mr. Chairman, that I have asked a number of witnesses here and the committee has been very good to hear them all. I will have additional views as we go along, and will express my concerns here as well. But I also would like to state that I will not in any way hamper, impede, or hinder the progress of this leg-

islation to reach the floor, not only because I feel it is an important issue that should be heard, but also because of my own appreciation to its sponsors for not impeding S. 1080.

Thank you.

Senator SIMPSON. Thank you very much, we appreciate that attitude and your thoughtful approach to it, too.

I have a statement of Senator Laxalt that I will place in the record, along with Senator Leahy's statement. I ask unanimous consent that they be entered into the record. Also, the text of S. 2419.

Without objection, so ordered.

[The aforementioned follows:]

PREPARED STATEMENT OF SENATOR PAUL LAXALT

Mr. Chairman, I'd like to begin by expressing my thanks to you and to Senator DeConini for all your work on this legislation. We three have been working on this project for quite some time now and I personally know the time and energy you two have devoted to developing this legislation and advancing it in the Senate. We had hoped to add this proposal to S. 1080, our regulatory reform bill, but a range of tactical concerns prevented us from doing so. I deeply appreciate both of your cooperation and work on the Regulatory Reform Act. I firmly intend to assist you in any way in my power in moving S. 2419 successfully through the Senate.

Mr. Chairman, from my perspective this legislation is not primarily based on some statistical calculation of where lawsuits against the Federal Government are presently being tried. Rather, this legislation is based on a central principle of our jurisprudence.

I admit that we here in the Senate are not used to speaking in such academic-sounding terms like "jurisprudence." What we consider to be the "practical" consequences of legislation tends to dominate our debates. Yet I cannot avoid the conclusion that certain central ideas of our legal system—ideas which motivate the piece of legislation before us—have the most important practical consequences to the workings of our judicial system.

Why do people obey the law? This question has been at the heart of legal philosophy for centuries. Indeed, this question, for some, is indistinguishable from the question of what law itself is. Obviously, this question is also a practical one, central to the operation of any just and effective government.

Few believe that most citizens—certainly most citizens in a Republic—obey the law out of fear of punishment. Our government simply is not capable of dealing the swift and sure punishment required to create such a fear. Most citizens obey the law because, consciously or not, they have an attitude of respect for the law; they instinctively feel it is right for them to obey the law.

This attitude of respect for our law is engendered by a feeling that the law is just and is justly applied. In our Republic, just application of the law involves ensuring that every citizen has the opportunity to go to court to vindicate his claims under the law. In addition, the just application of the law requires that citizens see that the law is justly applied. Consequently, court proceedings must be public so citizens can see that competent judges and attorneys are employing fair procedures to resolve legal controversies.

Furthermore—as part of this need to demonstrate the just application of the law—court proceedings should be held in the community which has the most at stake in the litigation, which will be most affected by the outcome of the litigation. In this way, citizens do not have to leave their own community to see local judges, understanding the practical consequences of the application of the law, do justice. In most cases between private parties, existing venue laws achieve this result by setting the venue of an action where one or the other of the litigants live or do business. In suits against the Federal Government, however, we have seen important lawsuits, affecting regions outside of Washington, be tried here because the only parties were the Federal Government and a public interest law firm located here.

The legislation before us today remedies this anomaly. S. 2419 makes the impact of litigation a prime consideration in determining where a lawsuit against the Federal Government should be heard. Other considerations of justice may override this concern, but in the normal course of events, the impact of the litigation will be a dominating factor.

In this way—by putting lawsuits against the Federal Government before the communities most interested in them—S. 2419 will serve to enhance public appreciation that the Federal courts are engaged in the just application of our law. The critical importance of such public appreciation of the administration of justice was acknowledged as the "great cement of society" by Alexander Hamilton in Federalist No. 17. As Hamilton put it, the local "administration of criminal and civil justice is the most powerful, most universal and most attractive source of popular obedience and attachment. It is this which, being the immediate and visible guardian of life and property, having its benefits and its terrors in constant activity before the public eye, regulating all those personal interests and familiar concerns to which the sensibility of individuals is more immediately awake, contributes more than any other circumstance to impressing upon the minds of the people affection, esteem, and reverence towards the government."

Mr. Chairman, there are other arguments to be advanced on behalf of S. 2419. We will hear many today. I myself have made such arguments in greater detail in an essay published by the National Legal Center for the Public Interest.

I ask unanimous consent that this essay, "A Return to Traditional Considerations for Determining Venue," appear in full in the record of this hearing.

Thank you, Mr. Chairman.

PREPARED STATEMENT OF SENATOR PATRICK J. LEAHY

I am glad that we are conducting these hearings today on the subject of venue in the Federal courts. Venue is a functional and practical concept and not properly a political one. I can think of no better way to consider the merits of venue shifting legislation than to open the record for testimony and prepared statements from members of the bar, the academic community, and others who are particularly learned, experienced or familiar with venue both as a concept and as a practical matter.

I appreciate this forum because I believe a fair hearing on the matter will reveal that S. 2419 and other similar proposals are the result of popular rhetoric gone awry.

Pursuit of venue reform has continued in this Congress despite the absence of any data from the Administrative Office of the United States Courts which would indicate that a problem with the current venue and change of venue provisions even exists.

Venue has been governed over the last twenty years by well-settled principles favoring a functional choice of forums for the parties and the courts. No major abuses have been apparent in that time. The proposed "solution" is in fact entirely out of proportion to any case that can be made for the existence of a "problem."

Any effort to revise or amend the federal venue statutes should focus on efforts to improve the fairness and the efficiency of the judicial machinery and better serve the convenience of the parties and the traditional right of the plaintiff to select his forum.

As proposed, however, the changes in S. 2419 far exceed any fine tuning or revision of the present venue and transfer of venue provisions that might be needed.

The sweeping changes in S. 2419 would apply to any case brought by any plaintiff against any federal defendant in any federal court across the country. It would not be sufficient to elect a forum where the plaintiff or defendant resided or where the action arose. That jurisdiction would only pass muster if the residents were "substantially affected," and the government could therefore move to change venue any time it suited its convenience.

Placing the choice as to where a lawsuit should be tried in the discretion of the government defendant is in fact a disservice to all those who might wish to sue the government. Such a bill is counterproductive to many of our recent efforts to curb excesses in government. It is in effect a "Big Government" measure.

Insofar as S. 2419 promises to create a new layer of preliminary litigation, it will increase the cost and inconvenience to all parties involved. Under S. 2419, a challenge to the Federal Government can only come to trial after a long and excrutiating analysis by the court regarding the place of greater impact. There is no question that the government will be the ultimate beneficiary of a system that makes the outcome of the venue question subject to vague standards and undefined methodology.

Any difficulties encountered in bringing suit in the federal district courts under S. 2419 would be encountered equally by those seeking further consideration of their grievance at the appellate level.

The costs in time, inconvenience and in party and judicial resources all serve to discourage legal proceedings against the Federal Government.

S. 2419 would override the venue provisions in existing legislation, even where earlier Congresses have made special provisions for venue, based on the nature and special needs of particular statutes. Under the language of S. 2419, a petition for review could be filed in the judicial circuit in which the petitioner resided or had a principal place of business, even though a law like the Clean Air Act specifies a centralized judical review. This provision of the amendment would make a blanket judgement about laws that other Congresses carefully scrutinized. The dispersal of litigation under the Clean Air Act and other essential health, safety and environmental statutes may frustrate their enumerated goals and purposes.

Finally, this bill undermines its own solution to the "race to the courthouse" problem that now arises where multiple proceedings on the same agency order are instituted in more than one circuit.

I do believe that two concerns raised by the proponents of this bill—issues of notice and ability to participate—are legitimate and should be addressed.

In the views which I submitted on previous Simpson and DeConcini proposals which were much narrower, I had no objection to and in fact supported provisions which would have heightened the courts' sensitivity to local impact in cases where the venue issue was raised.

I also supported provisions for ensuring that States which are affected by an environmental action will have adequate and timely notice that a case has been brought in another judicial district. Those procedures required a plaintiff to forward a copy of his complaint to the attorneys general of up to five States potentially affected by a suit with localized environmental impacts. Notice provisions would ensure that affected persons would have a better opportunity to intervene in a timely fashion to bring a motion to transfer.

But aside from these points, S. 2419 is a step backwards to the days of rigid venue formulas and favoritism to the federal defendants. It strips the plaintiffs of their traditional right to elect where to sue, ignores the convenience of the parties, severely increases the costs of litigation against the United States, and needlessly burdens already overworked judges with futile and complicated venue questions.

Most important of all, the bill allows government to become less accountable, at a time when accountability should be more important than ever.

I am glad that the hearings today will give us an opportunity to determine just how well S. 2419 serves the rights of plaintiffs and parties, facilitates access to the courts, and promotes judicial efficiency in procedural matters.

II

Calendar No. 558

97TH CONGRESS
2D SESSION

S. 2419

To amend title 28, United States Code, regarding venue, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 21 (legislative day, APRIL 13), 1982

Mr. DECONCINI (for himself, Mr. SIMPSON, Mr. HATCH, Mr. ZORINSKY, Mr. LAXALT, Mr. ABDNOR, Mr. DOMENICI, Mr. GRASSLEY, Mr. BURDICK, Mrs. HAWKINS, Mr. COCHRAN, Mr. MURKOWSKI, Mr. GOLDWATER, and Mr. GORTON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MAY 3 (legislative day, APRIL 13), 1982

Ordered, that if the committee has not reported the bill by May 14, 1982, the bill be considered as having been discharged, and that it be placed immediately on the Senate Calendar

MAY 14 (legislative day, MAY 11), 1982

Committee discharged; placed on the calendar

A BILL

To amend title 28, United States Code, regarding venue, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2112 of title 28, United States Code, is amended—

(1) by striking out the last three sentences of subsection (a);

(2) by redesignating subsections (b) and (c) as subsections (c) and (d), respectively; and

(3) by inserting the following new subsection:

"(b)(1) If proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the first such proceeding was instituted more than five days before the second, the record shall be filed in that court in which the proceeding was first instituted. If the first such proceeding was not instituted more than five days before the institution of a later proceeding with respect to the same agency action, and the agency, board, commission, or officer concerned has received written notice from the parties instituting each of these proceedings, the agency, board, commission, or officer concerned shall promptly advise the Administrative Office of the United States Courts, in writing, with respect to the first proceeding and all proceedings initiated within five days after the first proceeding, that such multiple proceedings have been instituted and shall identify each court for which it has notice that such proceedings are pending. Pursuant to a system of random selection devised for this purpose, the Administrative Office thereupon shall select the court in which the record shall be filed from among those identified by the agency. Upon notification of such selection,

the agency, board, commission, or officer concerned shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded to the agency, board, commission, or officer concerned, the record shall be filed in the court of appeals which remanded such order.

"(2) Where proceedings have been instituted in two or more courts of appeals with respect to the same agency action and the record has been filed in one of such courts pursuant to paragraph (1), the other courts in which such proceedings are pending shall promptly transfer such proceedings to the court of appeals in which the record has been filed. Pending selection of a court pursuant to paragraph (1), any court in which a proceeding has been instituted may postpone the effective date of the agency action until fifteen days after the Administrative Office has selected the court in which the record shall be filed. Such postponement by the court may thereafter be modified, revoked, or extended by the court in which the record is to be filed.

"(3) Any court in which a proceeding with respect to any agency action is pending, including any court selected pursuant to a system of random selection pursuant to paragraph (1), may, in the interests of justice, transfer such proceeding to any other court of appeals and shall, upon motion by any party thereto, transfer such proceeding to the court of

appeals for a circuit in which the action under review would have a substantially greater impact, unless the interests of justice require the court to—

"(A) retain such proceedings, or

"(B) transfer the proceedings to a circuit other than one in which the impact would be substantially greater.

"(4) Notwithstanding any other provision of law, a petition for review of any agency rule reviewable directly in a circuit court of appeals may be filed in the judicial circuit in which the person seeking review resides or has its principal place of business.".

SEC. 2. Section 604(a) of title 28, United States Code, is amended—

(1) by redesignating paragraphs (17) and (18) as paragraphs (18) and (19), respectively, and

(2) by inserting after paragraph (16) the following new paragraph:

"(17) Pursuant to section 2112 of this title, where proceedings with respect to action of any agency, board, commission, or officer have been instituted in two or more courts of appeals, administer a system of random selection to determine the appropriate court in which the record is to be filed.".

SEC. 3. (a) Section 1391 of title 28, United States Code, is amended—

(1) by amending subsection (e) to read as follows:

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought only in a judicial district in which—

"(1) a defendant in the action resides;

"(2) the cause of action arose;

"(3) any real property involved in the action is situated; or

"(4) the plaintiff resides if no real property is involved in the action,

except that no such action may be brought in a judicial district pursuant to paragraph (1) or (4) hereof unless the agency action or failure to act that is the subject of the lawsuit would substantially affect the residents of that judicial district. A cause of action pursuant to paragraph (2) hereof shall be deemed to arise in the judicial district or districts in which the residents would be substantially affected by the agency action or failure to act that is the subject of the lawsuit. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Proce-

dure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

"The summons and compiaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."; and

(2) by adding at the end thereof the following:

"(g)(1) In any action brought in the United States District Court for the District of Columbia under subsection (e) that may be an action of a local environmental nature as defined in paragraph (3) of this subsection, the plaintiff shall, at the time the action is filed—

"(A) forward a copy of the complaint to the attorney general of each State in which a judicial district described in paragraph (3) of this subsection is located, subject to the limitation provided in paragraph (2); and

"(B) file a statement with the clerk of the court indicating compliance with the requirements of subparagraph (A).

"(2) The provisions of paragraph (1)(A) do not require the plaintiff to forward a copy of the complaint to more than five State attorneys general.

"(3) An action is an action of a local environmental nature if—

"(A) the action primarily affects local or regional interests in one or more contiguous judicial districts other than the district in which the action was originally filed; and

"(B) the action arises under any Act of Congress pertaining to wildlife, public lands, water rights, or any other Act of Congress relating to environmental quality.

"(4) Compliance with this subsection does not constitute an admission by the plaintiff that the action is an action of a local environmental nature as defined in paragraph (3) of this subsection. Failure to comply with this subsection may be cause, in the discretion of the court, for appropriate sanctions, including dismissal of the action without prejudice.".

(b) Nothing in the amendments made by subsection (a) of this subsection shall be construed to affect venue in an action relating to civil rights.

SEC. 4. Section 1404 of title 28, United States Code, is amended—

(1) in subsection (a) by inserting before the period the following: ", except that the court shall transfer actions described in subsection (e) of this section in accordance with that subsection"; and

(2) by inserting at the end thereof the following:

"(e) In any civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or the defendant is an agency of the United States, or the United States, a district court shall, upon motion of any party thereto, transfer the action to a district or division, where the action might have been brought, and in which the action would have a substantially greater impact, unless the interests of justice require the court to—

"(1) retain the action, or

"(2) transfer the action to a district or division other than one in which the impact would be substantially greater.".

Senator SIMPSON. I do encourage the witnesses to summarize their testimony before us today. I think you have each been advised of that. If you could limit your testimony to just several minutes, so that we might have questions, certainly 5 to 7 minutes, if that is at all possible for you. I don't have my light here with the yellow button and the red button and the green button, which is a very impressive thing when we do have that burning. Your statement will be part of the record, of course; and so we might have questioning, if you will follow the time limitation.

So our first witness is Carol E. Dinkins, the Assistant Attorney General for Lands and Natural Resources of the Department of Justice.

We welcome you to the hearing today. How are you?

STATEMENT OF CAROL E. DINKINS, ASSISTANT ATTORNEY GENERAL FOR LANDS AND NATURAL RESOURCES, DEPARTMENT OF JUSTICE

Ms. DINKINS. Fine, thank you, Mr. Chairman. I appreciate the opportunity to appear today to testify in favor of S. 2419.

This is a bill which we believe is very important to the administration's overall policy in the area of court administration and justice, and it is, of course, a matter which will have a significant impact on many cases which we in the Lands Division defend on behalf of our client agencies.

We believe that this is a straightforward, concise approach to a very complex problem, the problem that citizens should be able to take a legitimate interest in the programs and activities of the Federal Government, programs and activities that are frequently effectuated through court action. We believe that although citizens may not have a legal interest in the suit, they may in fact have a very real interest in the outcome, and they should be able to know about and follow the progress of such litigation through the court system.

As you noted earlier, there has been a long history of a venue provision, and originally, in 1962, Congress enacted the amendments which provide for cases to be brought elsewhere than the District of Columbia. We believe, however, that the fact that it is not mandated currently that cases be transferred outside the District of Columbia, that there is still the opportunity for the judges in this District to hear cases whose nexus might be better tried elsewhere.

We believe that the litigation affects many more parties than just those that are parties to the lawsuit, and we believe that those people should be assured the opportunity to follow such litigation through local publicity. We believe that there is much merit to providing a convenient forum so that State and local governments or local citizens or organizations may have the opportunity to intervene without traveling thousands of miles to do so. The current situation perhaps is more convenient for Washington lawyers and organizations and for the local attorneys of the United States at the Department of Justice, but it is not convenient for those parties who must themselves travel thousands of miles because the cases are tried here and they have an interest in it.

There are a number of examples. Senator DeConcini mentioned one that we think is very important, the Salt River case. We have another case involving coyote control which was brought here in the District of Columbia. The seven substantive counts were transferred outside the District of Columbia, but two other courts remained here in the District. And we felt that that case could have been better tried in its entirety in the District court, perhaps in Wyoming where a similar case is pending.

We have recently had a case filed by the National Wildlife Federation involving coal leases in the Powder River basin in Montana and Wyoming. We believe that these types of cases—all three of these—are examples of the types of cases that more properly should be brought in a district outside the District of Columbia.

We have noted several ambiguities, several provisions in the bill which we would advocate changing or clarifying, and those are set out in my testimony.

I would be pleased to answer any questions you have.

Senator SIMPSON. Thank you very much. Your testimony was well compiled and we appreciate having it. You had expressed in your testimony some concern over the ambiguity that you see in subsection 4 of section 1 of the proposed legislation. And the intent behind that provision, as I have felt it to be, is to supplement the special venue statutes by providing for an additional place for venue, the circuit in which the plaintiff resides. If that were necessary to be made even clearer, would you be more supportive of that provision?

Ms. DINKINS. We believe that you could either clarify the provision, or perhaps that is an area where some initial litigation would clarify it. But I think that certainly if you could clarify your meaning within the four corners of the bill, that would improve it.

Senator SIMPSON. You also stated that the transfer provisions of section 1404 would require the court to determine which district had the greatest impact. Now, that section of the bill calls for only a determination of substantially greater impact.

How could that lead to a determination of greatest impact?

Ms. DINKINS. Our concern with that portion of the bill is that frequently these impacts are not easily measured, and you may have a multitude of impacts that are contained within a particular piece of litigation, and you would end up litigating the quantification method on the various aspects of the litigation that you would try to quantify for impact, and we think that that would be a difficult provision of the bill to get through without litigation.

Senator SIMPSON. Senator DeConcini?

Senator DECONCINI. Mr. Chairman, I don't have any questions. I thank Ms. Dinkins for being here and for her statement. I am also grateful for the additional cases she has provided for the record and which complement the *Salt River* case. I am pleased that the administration, after studying this proposal, agrees that it is a proper and moderate approach toward venue, and I thank you.

Ms. DINKINS. Thank you, Senator. We do believe it is proper.

Senator SIMPSON. Senator Leahy?

Senator LEAHY. How many cases are there where venue should have been switched from the District of Columbia to another forum

to which they might have been switched if this bill had been in effect? How many cases are there?

Ms. DINKINS. Senator, we do not keep our docket control records in a way that would permit us to access that information without going to each case that we have filed in the District of Columbia, in which the United States is a defendant. We have not tried to compile statistics; we believe it is sufficient to look at the fact that we have some outstanding cases where it is very clear that this has been a problem.

Senator LEAHY. How many of those cases are there? You say that there are some outstanding cases of which you are aware, but approximately how many?

Ms. DINKINS. I cited some of the most recent ones for you in the testimony. Again, we do not keep statistics like that, and I have not tried to poll my lawyers to get any type of statistic.

Senator LEAHY. How many cases would you say that you are personally aware of? I realize you don't keep the records—but how many are you personally aware of? Are we talking about a couple of hundred or 5 or 10?

Ms. DINKINS. I couldn't say, Senator, because when we are engaged in the venue portion of the litigation, we have in the Lands Division 25,000 cases and matters pending at any given time. I don't follow the whole docket constantly.

Senator LEAHY. I understand. Well, you must have at least looked back to see what impact there would be in supporting this legislation. I am sure that you—well, I know, of course—that you would want to know just what impact it might have. And so at some point somebody must have done a study to see what the probable impact would be.

What did that study find?

Ms. DINKINS. We have not done a study of the probable impact on a numerical basis.

Senator LEAHY. Do you mean that you would support this without knowing what the impact might be?

Ms. DINKINS. Senator, we believe that we can evaluate the impact by knowing the types of cases that we customarily see in the Lands Division that are more appropriate to bring in a forum outside the District of Columbia, and we have not tried to set down on a 1-2-3 basis the exact numbers of those cases. I don't believe that it's necessary for us to do that to be able to support this legislation strongly.

Senator LEAHY. So as far as important legislation goes, it wouldn't make any difference to you whether it might affect 1 case or 500 cases?

Ms. DINKINS. I believe that the principle is what we are interested in here.

Senator LEAHY. Then it would not make any difference to you whether it was 1 case or 500, your concern is simply the principle that's involved?

Ms. DINKINS. Yes, sir.

Senator LEAHY. Two years ago, the Administrative Office of the U.S. Courts said that there was no way to determine what effect a broad amendment to the general venue statute would have upon

the caseloads or on the litigation processes. In the last 2 years has anyone made any attempt to find out what effect it would have?

Ms. DINKINS. No, sir. We have U.S. attorneys' offices throughout the United States, and our cases are either litigated by lawyers from main Justice or by the assistant U.S. attorneys who are within the districts throughout the United States. And the litigation that is filed against the United States must be defended whether it is in the District of Columbia or whether it is in some other judicial district.

Senator LEAHY. You don't think it would make any difference, for example, in the appropriations the Department of Justice would need, whether it affected 1 or 500 cases?

Ms. DINKINS. By far the most substantial portion of our budget is for the salaries for the attorneys. The travel is relatively constant from year to year, taking into account the normal adjustments. But I believe that when you look at the amount of time that we spend on the cases and the lawyers' salaries that we pay out of our budget, that the travel costs of several hundred dollars or even several thousand dollars, if there are cases which would be more appropriately handled by a lawyer from main Justice rather than by an assistant U.S. attorney or a U.S. attorney, that we would be able to accommodate those costs.

Senator LEAHY. Let me put on my other hat as a member of the Appropriations Committee. Would I be safe to tell my colleagues on the appropriate subcommittee there that if this legislation were to pass you would not see any need for an increase in appropriations?

Ms. DINKINS. We do not think this would be a major budget problem, no, sir.

Senator LEAHY. But you don't see any increase in appropriations based on this?

Ms. DINKINS. I do not at this time, no.

Senator LEAHY. One last question, if I might. What does "substantially affected" in the bill mean?

Ms. DINKINS. We have suggested in my prepared testimony—and it is noted in the middle of page 5—that we believe that the term "substantially affected" should be clearly defined in the legislative history, whatever is intended by the Congress, if this is passed, so that there will be minimized any future litigation over what that term means.

Senator LEAHY. Are you saying that the Justice Department is willing to endorse this without even knowing what we might put in the legislative history concerning the term "substantially affected"?

Ms. DINKINS. Well, I think there has been considerable——

Senator LEAHY. You have a great deal of faith in us, and I appreciate it. More cynical people might call it Pollyannic, but I am sure that it is based on the fact that you hold the Congress in such high regard.

Ms. DINKINS. Senator, I believe that this particular venue provision, and those similar to it, have been debated substantially in Congress and that all of us have a fairly good idea that you will not be going far afield from what you have looked at in the past.

Senator LEAHY. I know the American Enterprise Institute is very critical of the venue shifting proposals, and they seem to have

some difficulties with what "substantially affected" means. But you seem perfectly willing to endorse it and trust in our wisdom in putting together a good enough legislative history, in fact, a legislative history that will affect your litigation. Are you very comfortable with that?

Ms. DINKINS. Yes, sir.

Senator LEAHY. Such faith has been known to move mountains, Mr. Chairman.

Senator SIMPSON. It certainly has.

Senator LEAHY. Thank you.

Ms. DINKINS. We are just interested in the venue bill, Senator.

Senator LEAHY. Well, so are we, but we are also interested in how much litigation you are going to have to do under it, too.

Senator SIMPSON. Let me say—and I know the Senator from Vermont is well aware—that there has been a good deal of debate about the definition of "substantially affected." It's contained in the various papers written, it is contained in earlier hearings, and I think upon reporting of this bill we will have report language which will be very helpful in giving further essence to that.

But it is not something that has just suddenly popped up; it's been discussed a great deal.

Let me ask you one further question. In your mind, would this legislation increase or decrease litigation?

Ms. DINKINS. We do not believe that the legislation will cause a substantial increase in litigation, and we have noted that in my testimony.

Senator SIMPSON. I thank you very much, Ms. Dinkins, and appreciate your testimony.

Ms. DINKINS. Thank you, Mr. Chairman.

[Prepared statement of Carol E. Dinkins follows:]

TESTIMONY

CAROL E. DINKINS

ASSISTANT ATTORNEY GENERAL

LAND AND NATURAL RESOURCES DIVISION

DEPARTMENT OF JUSTICE

I am very pleased to be here today to testify on the Venue Bill, an amendment to the federal statutes which we believe is an important part of the Administration's overall policy regarding courts and court administration, and one which will have significant impact on many cases which we in the Lands Division litigate for our client agencies.

This is the third Congress in which efforts have been made to change the general venue statutes. The purpose of those efforts has been to find a way to ensure that actions in which the federal government is sued which directly affect people other than in the District of Columbia are brought in the district where people are so affected. Surely citizens have a legitimate interest in the programs and activities of the federal government, which are sometimes effectuated in the context of a lawsuit. While these citizens may not have a legal interest in the suit, they may well have an interest in its outcome. And they should be able to know about it and follow its progress through the legal system.

During the past 4 years, several bills have been introduced which attempt to accomplish that result -- bills which have become increasingly sophisticated in their approach to the problem. With the exception of a few provisions which I will mention in this testimony, we believe that the approach taken by the present bill is straightforward and concise, does not present ambiguities to be addressed by the courts, and avoids earlier problems of threshhold litigation in the venue process, thereby dealing efficiently with the problem. The Department of Justice strongly supports the bill which is before the committee today.

Section 1391(e) of Title 28 of the United States Code was enacted in 1962, amending an earlier statute which had resulted in almost all cases filed against the government being heard in Washington, D.C. At the time Congress passed the 1962 amendments, it noted that "the current state of the law respecting venue and actions against government officials is contrary to the sound and equitable administration of justice . . . where a citizen lives thousands a miles from Washington, where the property involved is located outside of the District of Columbia, where the cause of action arose elsewhere, to require that the action be brought in Washington is to tailor our judicial process to the convenience of the government rather than to provide readily available, inexpensive judicial remedies for the citizens who have been aggrieved by the working of the government."

The 1962 amendments allowed the parties to exercise considerable discretion as to where cases would be filed. Although the amendment resulted in many cases being tried outside of the District of Columbia, cases whose nexus is elsewhere continue to be tried in the district court here in the District of Columbia.

The permissive wording of the existing venue provision, Section 1391(e), must be revised to ensure that venue choices based on either plaintiff's or defendant's residence must also take into account whether that is the district whose citizens will be directly affected by the litigation. Clearly litigation affects much more than just the parties to a lawsuit. There is merit to ensuring that all those affected be given the chance to follow the action through local publicity. There is merit to providing a convenient forum so that state or local governments or local citizens or organizations can have the opportunity to intervene without traveling thousands of miles to do so. People throughout the country deserve to have a localized case tried before a local judge who understands the area's problems and can view the case and apply the law in that context. I believe that S.2419 accomplishes these purposes.

Let me give you several examples of cases which have recently been filed or heard in the District of Columbia which, if this amendment had been the law, would not have, and should not have been heard here.

The U.S. District Court for the District of Columbia recently heard a case, filed against the Department of the Interior by the Humane Society, challenging the Department's animal damage control program. The case was filed here because of the residence of the parties; the only impact was in the West. The program primarily involves the control of coyotes in western states. A similar case is pending in the District Court of Wyoming. The Lands Division, representing Secretary Watt, moved to transfer the D.C. case to Wyoming, where it could be consolidated with the Wyoming action. All considerations of judicial efficiency mandated transfer. Nevertheless, the district court judge here denied the transfer for two counts, deemed procedural, while transferring the seven substantive counts to Wyoming. Had your amendment been law, the action could not have been properly filed here.

Another case, which the D.C. District Court has just transferred, on our motion, was filed here by an Arizona Indian Tribe to force the Interior Department to divert more water from the Salt River Project to its reservation. Arguing against our motion to transfer, attorneys for the Indians did not dispute that the people of Arizona have the greatest interest in this case, but argued that Arizona's interest in the outcome of the litigation was <u>so great</u> that the Indians could not receive an impartial hearing there even in Federal court. The Court disagreed, saying among other things, that there would be many people in Arizona, besides the Tribe, who would be substantially affected by the case -- people who might, and very likely will become parties. If S. 2419 were law, the case could have been properly filed only in Arizona.

In late April the National Wildlife Federation brought suit against the Department of Interior to block coal-lease sales in the Powder River Basin of Montana and Wyoming. Involved are 13

tracts of land covering about 32,000 acres that contain almost 1.5 billion tons of coal reserves. The NWF asked the District Court of the District of Columbia to enjoin lease sales until comprehensive land-use plans can be developed for the region, although the case would have no impact on the District of Columbia. Had this bill been law, the action would have had to have been heard in a district in Montana or Wyoming encompassing the Power River Basin.

This bill not only changes the venue of cases heard improperly in the District of Columbia but also forecloses venue in actions brought against the government in any judicial district in which the residents of that district would not be affected by the action. Its approach is an even-handed one. For example, a case was heard in the Western District of Louisiana involving a challenge to an EPA-established effluent guideline for a toxic chemical. Although there was virtually no impact on the residents in the Western District of Louisiana, industry apparently chose it because it felt that the the judge was sympathetic to the trade association's position. One company belonging to the association had a plant in that district, making venue proper under §1391(e)(4). Had this bill been law, venue would presumably have been improper there.

We are convinced that the approach taken by S. 2419 to amend 1391(e) is a workable solution to the problem and that this amendment would not cause additional litigation. Several of the earlier drafts of the bill, including those which were the subject of hearings before this committee two years ago, would have caused substantial threshhold litigation, and could have adversely affected cases which the authors did not intend to cover.

Under the present proposal, cases having substantial effect on the residents of a particular district or districts but filed elsewhere would have to be dismissed, without prejudice, unless residents of the district in which they were filed were also substantially affected by the litigation. (The term "substantially affected" should, of course, be clearly defined in the legislative history in order to minimize future litigation over its meaning.)

The case would then simply be refiled in a proper forum, at which time the Court could entertain a §1404 motion to change venue to another proper district where it might have been brought, for the convenience of the parties or in the interest of justice.

The mandatory language used in the amendment to 1391(e) would prevent the court from hearing the case upon a showing by the defendant that it was in the wrong district. We believe the language is sufficiently precise to require the Court to dismiss such case; the defendant would not have to rely on a discretionary transfer motion.

We believe the language is also sufficiently precise so as to prevent the amendment from mandating venue in an improper forum, for instance, in a district without jurisdiction. Earlier drafts might have had such a result; we do not believe that this one will.

There are several sections in the bill which we believe are unnecessary and which we propose be deleted. First, we believe the notice section included in Section 3 is redundant. Because the first part of Section 3, amending Section 1391(e), is mandatory, and requires that cases which affect the residents of a particular district be heard in that district, it is highly unlikely that any such case will be heard by the District of Columbia courts. Because the language used is mandatory, any government lawyer appearing in such a case filed in the District of Columbia would ask that the case be dismissed based on improper venue. The court would have no choice but to do so. Therefore, the section requiring notice to State attorneys general for "local environmental actions" filed in the District of Columbia is unnecessary since such a case would have to be dismissed and refiled in one of the affected districts.

Second, we find the amendment to Section 1404 of Title 28, which is in Section 4 of the Bill, unnecessary and unworkable. It is not crucial that a case be heard in the district in which it has the <u>greatest</u> impact. It is often impossible to measure impacts, and considerable litigation could arise solely over this requirement.

It could also encourage forum shopping among judges in several possible districts. The important thing is to remove such cases from the District of Columbia to one of the districts where people affected by the case live. The present language of Section 1404, which allows the court to transfer a case to a district more convenient to the parties or in the interest of justice, will be sufficient, as it stands, to remove the case to the proper forum, after the amendment to 1391(e) has been enacted. The case which I mentioned a moment ago involving the Powder River basin would affect people both in Wyoming and Montana. It doesn't really matter whether the case is in the district court in Wyoming or in Montana. The court could transfer the case from one district to another under Section 1404, if it felt the need to do so. It <u>does</u> matter, however, that the case be in one of these districts rather than in the District of Columbia, and the amendments to Section 1391(e) will accomplish that without the time-consuming, experience and essentially useless maneuvers called for by a change to Section 1404. Accordingly, we suggest you leave the transfer section the way it is.

We endorse the lottery provision that the bill includes, designed to solve the race-to-the-courthouse problem generated by 28 U.S.C. 2112, which was passed by the Senate as part of the Regulatory Reform Bill. But we question the utility of the other two changes S. 2419 makes to this section: namely, its addition of an impact test to the transfer provision of Section 2112 and its attempt to override special venue statutes. The first will lead to more litigation and is really an unnecessary addition to the lottery system. There is already an "interests of justice" transfer provision in 2112 which we think is sufficient.

The second provision, found in Section (1), subsection (4) of the bill, is ambiguous. Does it intend to override special venue statutes and substitute plaintiff's residence or principal place of business as the only possible venue? Or does it merely make residence and place of business acceptable as well

as the special venue provided in the specific venue statute? This ambiguity should be resolved before enactment.

In summary, we strongly urge the Committee, and the Senate, to pass those parts of S.2419 mandating that cases be heard where their impact will be felt and substituting the lottery for the present race-to-the-courthouse system. We find the rest to be unnecessary and confusing -- an attempt to remedy problems satisfactorily handled by the other provisions.

I hope these comments are helpful. I would be happy to answer any questions you might have.

Senator SIMPSON. The next witness is Dan Burt of the Capital Legal Foundation.

Mr. Burt, please, will you come forward?

STATEMENT OF DAN BURT, CAPITAL LEGAL FOUNDATION.

Mr. BURT. Thank you very much, Mr. Chairman, Senators DeConcini and Leahy, we welcome the opportunity to be here and testify.

Our prepared testimony as well as the venue study we did was published on September 17, 1981.

I won't spend very much time at all summarizing this testimony, certainly not for the reasons for the change. In our view, in the interests of fairness, more sensitive judgments by courts, historical consistency, we address as what we see as the current imbalance in the decisionmaking process now.

What I would prefer to do is briefly address the reasons that I anticipate those opposed to S. 2419 will give for their opposition.

In summary, what I expect they will say is, first of all, that the D.C. courts should be left untouched because of their expertise in administrative law. We don't believe that is something to be concerned about. We have been told that all judges can read and interpret decisions, they are on the record, administrative decisions as well.

There is an argument that this provision will raise costs for litigants; only for a very small group of public interest organizations. Many of those, by the way, are very well funded and some have local offices.

There has been an argument that since national policy is set here, cases should be heard here. However, the whole point—or one of the points about the Federal circuit court system—is that national policy can be effectuated best by the courts with due sensitivity to local concerns.

There has been an argument that this legislation will deny people access to the courts. Again, who would be denied that access? The only people who may possibly be adversely affected—and that only in a very minor fashion—are some very small single-

issue groups, environmental groups, and, of course, the law was not passed necessarily to help them.

We don't believe there will be any problem with the problem of vagueness. All laws are vague when they are passed and have to be interpreted by the courts.

We don't believe the courts outside the District of Columbia would be inundated with litigation; if they are, we can always transfer some judges from the District of Columbia circuit.

The real reasons, we believe, that this legislation is opposed by the people who oppose it is best explained in a quote from a man named Brecher, which appeared in an article called "Venue and Conservation Cases: A Potential Pitfall for Environmental Lawyers," here about 10 years ago—and I quote it's very brief:

> Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance, serving primarily to focus public attention on an issue. An executive or legislative solution is far more satisfactory than a judicial pronouncement in the long run. And political decisions in the conservation arena are largely a function of public pressure. A suit in Washington is certain to receive more extensive coverage by the media than one in the district of Utah, for example. All major newspapers, wire services, and broadcasting networks have Washington bureaus; this is rarely the case in rural areas.
>
> Evironmental lawyers are often handicapped when a trial is held in a local problem area. Few circuits are as understanding of the conservationist cause and of the difficult issues raised in conservation cases as the D. C. Circuit. A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view. Local residents and newspapers are apt to favor projects in their locality even at the cost of substantial environmental damage, for two reasons. First, large federal landholdings or depressed economic conditions often make the local tax base extremely small; thus, residents see the construction of new projects in terms of upgrading schools, libraries, roads, and other public facilities."

I will stop there. Obviously it's a horrible thing to have people concerned about schools and libraries and roads.

What you have here is very simple: A small group of passionate people are attempting to deny the mass of people in this country their day in court.

Thank you.

Senator SIMPSON. I must leave; I will return. And Senator DeConcini will chair the hearing from this point and I will return shortly.

[Senator DeConcini assumes the Chair.]

Senator DECONCINI. Thank you, Mr. Chairman. Mr. Burt, I say this with some hesitancy, and I am sure it is not what you intended, but you just left me with the impression, in the part of your statement that you read that says for one reason or another you feel that the judges in Arizona or Wyoming or New Hampshire or Vermont might not be capable of handling a case that the local community may have some strong feelings about.

Do you really believe that?

Mr. BURT. No; not at all, Senator. The fact of the matter is that what we think is critical in cases that primarily affect a local community is that someone with sensitivity to the local concerns and local conditions have that sensitivity as part of the process, use that sensitivity as part of the process by which a decision is made. That's the thing that most concerns us. When decisions are made in Washington, that sensitivity is absent.

Senator DECONCINI. So you feel that the environment in which a district court sits is part of our judicial system, part of the whole judicial process, and yet a judge obviously is going to be impartial. I believe district judges generally are. You don't have any quarrel with that do you?

Mr. BURT. It would be a terrible slur on the judiciary to argue that all of the best minds are here in Washington.

Senator DECONCINI. I'm glad to hear you say that, because I have the greatest respect for the judges here, but as you point out, this is not the only citadel of superior competent judges that sit on the bench. I think we all take pride in the fine judges we have in our various States.

Are you familiar with the *Salt River Pima-Maricopa Indian* case?

Mr. BURT. Yes; I am.

Senator DECONCINI. Sometimes the argument is given, Mr. Burt, that that is the way the law is now. That the case can be transferred, and that that is a perfect example of why we don't need to make any changes. That Judge Flannery did exactly what the law provides, and properly so. That the case is now going to be heard in the district of Arizona where it should have been in the first place, so why do you need to tamper with and change the existing law?

What is your response to that?

Mr. BURT. Well, the problem, Senator, of the forum non conveniens argument, which of course is the argument you advance, is that it depends completely on the vagaries of the political climate in Washington or in the country. What we are looking for is long-term judicial consistency, and part of that consistency in our judicial system—and it goes back a thousand years, back to the English common law—is that local concerns will regularly be heard. The present system depends in part on whether or not, for example, the Justice Department raises the forum non conveniens argument, and that, of course, leads to question of local concern to hang in many cases upon the judgment of perhaps just one person in the Justice Department.

And that seems to me to be too narrow a base.

Senator DECONCINI. So in the *Salt River Pima* case, Judge Flannery could have just kept the case right here, and that would have necessitated the lawyers for the Indian community traveling here and trying the case here. There was nothing that mandated by any means that he do this.

Mr. BURT. Absolutely not. And there is another problem, if I may, Senator, and that is that many of the people most interested in this case, who now have to take account of the growth of public interest law, of whatever stripe it is--many of the people most interested are the local people who never get a chance where a public interest group brings a case and then the Government defends of coming in, or have a very difficult time of coming in and asking for that case to be transferred.

Under the proposed amendments, under S. 2149, the people most concerned and who should be represented have a much easier time getting into court.

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Senator DECONCINI. As a resident of Arizona, when the Pima case is filed in Washington, D.C., there is little chance that I would get notice of the filing.

Mr. BURT. Not unless you read law reports, which are very dull.

Senator DECONCINI. Right. If I wanted to raise the venue question, I would have to be an intervenor in some manner, and, quite frankly, I doubt whether there is more than 1 percent of people who had any notice in Arizona about that case. Indeed I have talked to some people who are involved with Indian water rights in Arizona. Those involved with this case knew about it—but other lawyers that represent Indian tribes in our State had no notice of it. They were astounded to see it, but were very pleased with the manner in which Judge Flannery handled it.

I thank you, Mr. Burt, for your testimony today, and your full statement will appear in the record, as the chairman has indicated.

I yield to my colleague from Vermont.

Senator LEAHY. Thank you. Mr. Burt, the position paper and the Capitol Legal Foundation study are criticized, as you know, in an editorial in the January-February issue of Regulation magazine, put out by the American Enterprise Institute, not one often accused of leftist leanings or anything of that nature. In fact, it's a magazine that most of us read here.

Let me just read from the editorial, which labeled venue-shifting legislation as "false federalism" and disagreed philosophically with the entire approach of this legislation. The editorial stated:

> "It is no secret that the major purpose of the changes is to shift environmental cases to courts that are likely to restrict the scope of environmental protection laws. However desirable such restriction may be, and this journal could hardly be accused of environmental extremism, one must question the desirability of achieving it through the device of venue. It is one thing for private parties to scramble for the most favorable court; it is quite another for the law itself to do so. When built into the fabric of the law, legal realism suddenly becomes political cynicism. The consequences of acknowledging that our various courts systematically reach different results—and of fixing venue accordingly—are unacceptably corrosive."

I'm sure you have had a chance to look at that editorial. You must have some views on it, and I wonder if for the record you might tell us how you react?

Mr. BURT. Yes, Senator Leahy. First, let me note that my father is a fisherman, I love to camp and hike and sail; I am not an antienvironmentalist.

Senator LEAHY. I hope you don't feel anybody here was suggesting you were.

Mr. BURT. I hope not. That article by Professor Scalia, in my view, whatever reasons he may have had, reflected a very narrow, parochial view of the dynamic legal process in Washington. The fact is that the growth of public interest groups of all stripes in the last 15 years, coupled with the existence of a very bright and receptive bar in Washington, which I gather Professor Scalia will shortly join, has changed the game and has unbalanced the system; you no longer have the ability of everyone to get to the courthouse, to race to the courthouse, because that race only has, in many cases, one runner, and that is the particular pressure group or interest group located here.

I find it difficult to understand why if a Vermont quarryman is going to be out of a job, he shouldn't have the first opportunity to

protest about a decision that would have that effect on him, and I recently purchased land in a State very near yours, and I would be very concerned about any rule or any law that would open that land up, for example, to degradation. But how would I know about it if the case were brought here?

Senator DECONCINI. Thank you very much, Mr. Burt. We appreciate your testimony.

Mr. BURT. Thank you very much, Senator.

[Prepared statement of Dan M. Burt, along with supplementary comments, follow:]

TESTIMONY OF

CAPITAL LEGAL FOUNDATION

BY

DAN M. BURT, PRESIDENT

Mr. Chairman, Members of the Subcommittee:

I am pleased to be able to come before you today to discuss one of the legal profession's most important, yet little discussed items - venue - and the DeConcini-Simpson bill, S.2419. which would eliminate existing problems in this area of federal law. My name is Dan Burt and I am President of Capital Legal Foundation, which is an independent, tax-exempt, public interest law firm. Capital was formed several years ago to represent and defend a compassionate free market approach to federal regulation.

Capital's involvement with the venue issue began as a result of our environmental litigation study, which we completed last September. The original aim of the study was to ascertain whether environmentalists were suing primarily to delay projects. To try and determine this, we analyzed 274 federal cases decided since 1970 in which environmental public interest groups were parties. We selected eight prominent groups of this type: Environmental Defense Fund, Friends of the Earth, Natural Resources Defense Council, Sierra Club, Wilderness Society, Center for Law and Social Policy and Citizens for a Better Environment.

We placed a search request with the Lexis computer system to print out cases decided since 1970 involving these groups as parties. This request produced 370 cases, of which 96 were rejected because the case did not decide an environmental case, or because it duplicated another case in the printout.

We found that the selected groups won half of all the cases we reviewed. It was easy for the environmentalists to "win" for the purposes of our study because we counted as a win any case in which they won on <u>any</u> substantive issue. A loss, on the other hand, was a

loss on all substantive issues. This method clearly favored environmentalists.

Since the envrionmentalists won 50% of the cases they brought, we could not conclusively determine that delay, rather than winning on the merits of an issue, was a primary motivation behind a significant number of cases. In some instances, however, the environmental attorneys candidly admitted that delay was their goal.

We also found, however, that the public interest groups exploited their ability to forum shop under the existing federal venue statute in order to be heard by a shockingly sympathetic D.C. bench. We found that 31% of all the cases we reviewed were decided in the District of Columbia, which was then just one of ten federal court circuits. We also found that this one circuit accounted for 43% of all the victories in our study. Environmental groups, according to our study, were therefore more likely to come to D.C. to litigate and more likely to win once they got here.

Enviromentalists overall won 27% more often in D.C. than in the rest of the federal courts combined. This startling disparity in outcome between the D.C. courts and the rest of the federal bench suggests that the plaintiffs' choice of court, rather than the merits of the issue, often dictates the outcome of the case.

Not just the number of cases, but the type of cases brought in D.C. also troubled us. Case after case involved issues significantly affecting communities far from D.C., which would have been better decided by the courts located in the areas the litigation would substantially affect. The District of Columbia courts agreed, for example, to decide whether Mississippi farmers could use chemicals to control fire ants; whether the environmental impact statement for the Tennessee-Tombigbee waterway, to be constructed in southeastern states to connect them with the Gulf of Mexico, complied with the National Environmental Policy Act; and whether plans to control the salinity of the Colorado river basin were adequate. The list of such cases is, unfortunately, extensive.

We are not here today to question the wisdom of the District of Columbia courts' decisions in these cases. What we do question is the wisdom of the present federal venue statute which permits a court, perhaps sitting thousands of miles away from the land and people its decision will most affect, to decide cases affecting localities whose concerns, people, economies and sensitivities are completely unfamiliar to the judge. At issue is not the result in these cases, but the integrity of the decision-making process. As all recognize now, logic is not the life of the law.

When we examined the history of the existing federal venue statute to determine whether Congress intended to produce this result, we found it did not; in fact we learned that the present situation was born out of an historical accident and judicially created restrictions on pleading. The "accident" was that the District of Columbia courts are located on land ceded to the federal government by the State of Maryland in 1789. The new D.C. courts, according to the U.S. Supreme Court in McIntire v. Wood, 11 U.S. (7 Cranch) 504 (1813), had all the authority that Maryland law had granted them, including the authority to issue writs of mandamus. The rest The remaining federal courts were created under the Judiciary Act of 1789 and were not granted the authority to issue these writs.

These writs of mandamus are important because they could compel federal officials to perform their nondiscretionary duties. In suits against the federal government, this unique authority drew plaintiffs to Washington, D.C. - i.e., to the only courts with authority to solve their problems.

If, however, plaintiffs chose a remedy other than mandamus, the courts compelled them to come to D.C. by creating the doctrine of "indispensable parties," which required the joinder of senior officials in suits against the United States. Since high-ranking government officials are located in the District of Columbia, plaintiffs had to come here.

The legislative history of the current venue provision demonstrates that there was no coherent policy requiring plaintiffs

to sue the federal government in the District of Columbia. Instead, historical accident and judicial doctrine controlled plaintiffs' choice of venue in these cases.

In 1962, under the Kennedy Administration, Congress reviewed the federal venue law requiring plaintiffs to trek to D.C. in order to sue the federal government. The Kennedy Congress found that this inconvenience to plaintiffs and intervenors and flooding of the D.C. dockets, were unnecessary and unintended. In fact, the Senate Committee report accompanying the 1962 venue reform bill stated that the provisions in effect at the time were "contrary to the sound and equitable administration of justice." [Report, p. 2785]

The Senate Report outlined a series of problems caused by the venue requirements. First, the Report stated that:

> to require that the action be brought in Washington is to tailor our judicial processes to the convenience of the the government rather than to provide readily available, inexpensive judicial remedies for the citizen who is aggrieved by the workings of government.

The report went on to comment that many of the cases "involve problems which are recurrent but peculiar to certain areas. . . . These are problems with which judges in those areas are familiar and which they can handle expeditiously and intelligently."

The legislative history of the present venue provision clearly demonstrates that the 1962 Congress intended to reduce this litigating burden on "aggrieved citizens" which includes intervenors and to allow judges to decide issues that affect their own localities. In order to accomplish these goals, Congress passed the Mandamus and Venue Act of 1962. Under this Act, which remains in effect today, plaintiffs may now sue the government in any one of four judicial districts: (1) where the defendant resides, (2) where the cause of action arose, (3) where real property is located, or (4) where the plaintiff resides, if no real property is involved.

Ironically, this 1962 expansion of venue exacerbated the problem it was enacted to solve, one our environmental litigation

study clearly demonstrated. Public interest plaintiffs - a new breed bred in the 1960's - continued to sue in D.C., burdening the courts, depriving private citizens of the opportunity to sue or intervene in their district, and preventing local judges from deciding local issues.

Not only does the present statute give plaintiffs an unfair advantage by allowing them to select judges who are likely to rule in their favor, but it also encourages the growth of an institutionalized public interest bar located in Washington. Public interest attorneys, such those of us at Capital Legal Foundation, can not only forum shop, but may "plaintiff-shop" as well.

Under existing law, we are permitted to select our issues, no matter where they originate. We can then seek out plaintiffs, no matter where they live, and still sue the federal government in Washington, D.C. This system benefits organizations such as Capital, but it does not necessarily serve the interests of those most directly affected by the litigation.

We believe, for example, that those people living near a proposed nuclear power plant or hazardous waste site are entitled to have decisions affecting them decided in their district. Whose interest does it truly serve to have such issues decided in Washington? We submit that it is public interest lawyers and their hand-picked clients who benefit, and not residents of an area affected by the litigation.

The DeConcini-Simpson bill would solve many of problems engendered by the present federal venue statute. It would permit citizen plaintiffs and intervenors to sue where it is convenient for them. Local judges would be able to use their experience with local concerns in order to decide a case in their district. Finally, it would redress the disproportionate impact that single issue groups can have on federal case law.

In our view, the real reason this bill has attracted opposition is best expressed in comments made by one environmentalist, Joseph Brecher, in Ecology Law Quarterly in 1972:

> Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance . . . All major newspapers, wire services, and broadcasting networks have Washington bureaus; this is rarely the case in rural areas.
>
> . . . Few circuits are as understanding of the conservationist cause and of the difficult issues raised in conservation cases as the D.C. Circuit. . .
>
> A judge or jury trying a case in the local problem area is likely to be unsympathetic to the conservationist point of view. . . [R]esidents see the construction of new projects in terms of upgraded schools, libraries, roads and other public facilities. Judges and juries in the affected areas are likely . . . to feel that the public interest lies in building a project, rather than preserving the environment.

These are clearly insufficient reasons for retaining the current venue provision.

Other objections have been raised to S. 2419, including the claim that passage of this bill will generate a large amount of litigation as courts try to define "substantially affect" as used in the bill. While new legislation always increases litigation, we believe that today's hearing will help define these terms and reduce the amount of litigation.

Another complaint is that the modified venue reform will eliminate the plaintiff's right to choose the most convenient court. On the contrary, S. 2419 will permit plaintiffs to choose the most convenient court that has a reasonable connection to the issue to be litigated. S. 2419 will also eliminate the unjust advantage plaintiffs' currently have in their ability to select a court primarily because it is most likely to rule in their favor.

In order to complete the task that Congress began in 1962, it is necessary for this Congress to finally require plaintiffs to bring suits in jurisdictions most directly affected by the litigation. This will prevent courts, such as the District of Columbia circuit from having to decide a disproportionate number of cases and it will help return the judicial system and judicial decision-making to local areas where they belong.

**SUPPLEMENTARY COMMENTS
OF CAPITAL LEGAL FOUNDATION
ON S.2419**

Witnesses at the May 13, 1982 hearing on venue questioned the effect S.2419 would have on plaintiffs' choice of court in litigation against the federal government. In response to this, we reviewed the cases included in our Environmental Litigation Study (Study)[1] to determine what impact S.2419 would have on public interest environmental litigation.

We found that only 7% of the cases brought in D.C. were required to be brought here under current law. Clearly the fact that the D.C. circuit was selected so frequently as the forum for public interest suits indicates that the plaintiffs expected to receive favorable treatment.

Under S.2419 a minimum of 39% of the cases we reviewed would have to be brought elsewhere. These cases were all filed in D.C. voluntarily and involved local issues concerning other jurisdictions. S.2419 would prohibit D.C. judges from accepting these cases. It is indicative of the severity of the forum-shopping problem that the addition of two words - "substantially affect" - to the federal venue statute could have such a profound impact on public interest litigation.

The remaining cases (54% or 44 cases) were brought in D.C. by plaintiffs' choice but involved national issues.[2] It is likely

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1/ Environmental Litigation Study - First Phase Report, September 17, 1981.

2/ A "national issue" here is any issue that affects all members of a defined group. For example, national issues include cases affecting all nuclear power plants, the entire federal grazing lands leasing program. Any case involving less than all members, such as pressurized water reactors rather than all nuclear power plants, was considered to be a local issue. This method was chosen to ensure objectivity and consistency.

that under S.2419 many of these cases would be brought elsewhere. Since passage of S.2419 by Congress would make clear Congress's intent to have federal courts decide only cases closely connected to their jurisdiction. We would expect plaintiffs and judges to be more discerning when they choose a court or accept a case. However, it is difficult to estimate how often this will actually happen, since each judge must apply the standards and language of S.2419 to each case individually.

In conclusion, passage of S.2419 would greatly restrict the ability of plaintiffs to forum shop. Very few cases (7% in our study) currently have to be brought in D.C. Under S.2419 at least 40% of the cases we reviewed would have to be brought elsewhere. These facts indicate that S.2419 would effectively solve the problem of forum-shopping.

Senator DECONCINI. Our next witness will be Mr. Larry Gold, special counsel with the AFL-CIO.

Mr. Gold, we welcome you here today. Your prepared statement will be included in the record. If you will summarize for us, please.

STATEMENT OF LAURENCE GOLD, SPECIAL COUNSEL, AFL-CIO

Mr. GOLD. Thank you, Senator. I know that your schedule is a tight one. But I do wish to begin by apologizing for the fact that we didn't get our statement to you until this morning. It is brief and I will only touch on a few points, and then hope that I will be able to answer such questions as you have.

In essence, we believe that it should not be made more difficult than it is now for plaintiffs suing the Federal Government to choose a forum convenient to the plaintiff and that the question of the proper forum should not be subject to complex, uncertain, expensive, and time-consuming litigation. S. 2149 is, in our view, defective on both these counts, and we therefore oppose its enactment.

The venue rules, as we understand them, are designed to provide the plaintiff, the party who is seeking to vindicate his rights as granted by the law and who bears the burden of establishing those rights, a measure of choice, consistent with the interests of the defendant, in selecting the forum in which the case will be heard. That, we submit, is an eminently sensible and straightforward approach. It will not be improved by attempting to circumscribe the plaintiff's options in order to factor in the interests of potential intervenors, or of those who are affected by the case but are not even litigants.

Much of the litigation that the AFL-CIO participates in is brought in the courts of appeal, and normally concerns agency

action having a nationwide effect, such as safety and health standards issued by the Secretary of Labor or decisions of the National Labor Relations Board. Because our headquarters is in the District of Columbia, it is convenient for us to seek review of such agency actions here, and because the agency and its lawyers are typically located in Washington, from the standpoint of public policy the D.C. circuit is an entirely appropriate forum.

We have two basic objections to the suggestion that the courts of appeal shall transfer such proceedings to the circuit in which it is determined there is substantially the greater impact, subject to certain exceptions.

First, we believe that litigants should have the right, when it is convenient for them and for the Government, to bring suit against the Government in the Nation's Capital. Certainly that ought to be permitted with regard to any agency action having nationwide effect. Indeed, prior to the last significant change in the venue rules, suits against the Federal Government were required to be brought in Washington. It goes too far in the other direction, we submit, to bar the use of this uniquely national forum for cases of national effect.

Second--and I think this committee is uniquely sensitive to this point--litigation, particularly in the Federal courts, is already too complex, time consuming, and expensive. We think the situation would be made worse by requiring a preliminary ruling as to what part of the country, if any, will feel the greatest impact of the action being challenged and to determine also whether that impact is substantially greater than that felt elsewhere. In terms of the recent discussion of regulatory reform, we suggest that the cost of making such a determination is certain to outweigh the potential benefits. We also suggest that the substantially greater impact concept is one that is not capable of sure and uniform application. A ruling at the preliminary stage on potential impact will normally be little more than a guess based on incomplete and unreliable information.

The AFL-CIO participates in relatively less district court litigation, but, again, we are troubled by the proposition that venue should be limited to the judicial district in which "the agency action or failure to act that is the subject of the lawsuit would substantially affect the [district's] residents." As we point out, there are cases having effects on different parts of the country as to which there is no one certain proper forum that would be barred from the District of Columbia because of the happenstance that the law doesn't have an effect here. In such an instance the law in question is, nonetheless, a national law, this is the Nation's Capital, and, particularly where all the parties are here, this is as good a place as any to sue.

I don't appear as part of what appears to be basically a debate between environmentalists and those who will or will not be labelled as antienvironmentalists. The AFL-CIO's concern is that this bill goes well beyond that debate and affects other types of litigation, litigation with nationwide effects, that we think ought to be brought in the District of Columbia, if the plaintiff wishes to bring the suit here and if that is where the government decisionmakers are.

Senator DECONCINI. Thank you, Mr. Gold. Are you under the impression that S. 2419 would not permit filing in the District of Columbia or some place else when there is a national effect?

Mr. GOLD. No, the bill permits filing anywhere, as I understand it. It also provides, as I understand the bill, strong instructions on transfer, and instructions pursuant to, as I have attempted to point out, a rather complex fact-oriented standard which itself will produce litigation.

Senator DECONCINI. It seems to me, from your standpoint, that you are well protected, if, say, an EPA, a clean air case or an OSHA case that has significance outside the State of Arizona, Idaho, Vermont, or some other place arises, then it can be filed and properly so, in Washington, D.C. But, if it is going to affect only Arizona, I can't see the objection in having the case tried in the district court in that State unless you contend that possibly that can't be determined with any fairness, and that may be.

Mr. GOLD. What I was trying to suggest is that the standard of the bill, as I understand the language, which we quote on page 2 of our statement, is that in a review case in the courts of appeals challenging a nationwide health and safety standard—and I would say in terms of practical concerns, that is our overriding concern—if the case were brought here, that the court would have to make a determination not of whether the rule's effects are felt only in a particular State, but whether there is a substantially greater impact in one area of the country than in another. And that can turn out to be a very complicated issue because you are talking about comparisons. We have had cases where you have, say, 30 percent of the industry in the fifth circuit, and 20 percent in the third circuit, and the argument is that while there is only 20 percent of the industry in the third circuit, that is the segment of the industry that is most affected by the standard in practical terms——

Senator DECONCINI. Excuse me. Then it should be moved to another circuit in that case. Do you disagree that if you are talking about copper smelters in the West or in Arizona that it ought not to be in the first circuit in Boston; it ought to be in the ninth circuit.

Mr. GOLD. I do disagree.

Senator DECONCINI. You do disagree.

Mr. GOLD. I do disagree.

Senator DECONCINI. Because you think that is of a substantial nature that could be of as mutual interest to the first circuit as it is to the ninth circuit?

Mr. GOLD. I would put aside the case—and I think you may even have the better of the argument, and, if you do, and if it's important, maybe the law should be changed in this respect—that a case should not land in the first circuit if no aspect of the case is of any concern to anyone in the first circuit. I don't think many cases do.

I think you have before you a more difficult and subtle problem. If the rule is a nationwide rule and it affects people in many circuits, my view is that, given the various choices I have dealt with, the plaintiff or the petitioner, if you are talking about a court of appeals case, who gets there first, at least by some significant amount of time, ought to have his choice. And if a number of people betting on a different reception in different circuits arrive

at the courthouse more or less at the same time, that the random selection system makes sense.

But so long as this is one nation and a national law is the subject, you are not holding a local plebiscite on it when you sue; you are trying to determine what the law means. And the proposition that if there is a national law and the particular ruling happens to affect people in the State of Washington, nationwide organizations have to go to the time and expense of litigating that matter the State of Washington rather than here in the District of Columbia, does not seem to me to be a sound one.

Senator DECONCINI. Of course, the shoe can be worn on both feet; people in the State of Washington have to come all the way to Washington, D.C. to litigate.

Mr. GOLD. I would like to pick up a point that you taxed me with. I am not arguing for nor is the AFL-CIO in favor of the return to the prior rule that only the District of Columbia is the venue for suits against the Government—public law litigation against the Government. If it is the people in the State of Washington who are the plaintiffs or the petitioners, I think the ninth circuit ought to be open to them. I am only arguing that where random selection, if that is the means, puts the case in any circuit where there are people who have a concern with the issue or in the District of Columbia as a national court, it isn't worth the expense to require transfer.

Senator DECONCINI. Even if those people don't live in the State, but they have a concern? If there is a question of regulations on the extermination of coyotes and someone in Washington has a concern about it being enforced in Montana or Idaho or northern Arizona, you feel the proper forum ought to be here if they choose to file it, and not out there where the coyotes are and where it is affecting the population.

Mr. GOLD. The coyotes rarely defend these cases.

Senator DECONCINI. But the ranchers in——

Mr. GOLD. If the suit is a suit by somebody who Congress has giving standing challenging action or inaction by Federal officials under a Federal law—and I didn't use the word "Federal" that many times by happenstance—the Nation has seen fit to show a sufficient concern to bring the issue up to the Federal level and for there to be Federal statutory law on the matter. If the plaintiff has standing, I don't understand why he cannot sue the Federal official where the plaintiff happens to be and where the Federal official happens to be. Those are the two parties to the case. You are saying, yes, those are the two parties to the case, but there are people——

Senator DECONCINI. People that are affected by the results of the case.

Senator Leahy?

Senator LEAHY. Thank you. You talk about what happened in the Federal courts in Washington, D.C., but under this act isn't it true that a case brought in the plaintiff's hometown, a local forum for the plaintiff, could be transferred on motion by the Government defendant to a forum inconvenient for both the plaintiff and the defendant?

Mr. GOLD. Yes. We look at it from our own perspective. I just don't feel that we can properly speak for everyone on every issue, so I focused on our concerns about being moved out of forums that are convenient to us.

But I think your point is entirely sound. The person who seems to be lost sight of in S. 2419 is the plaintiff. He is the one who brings the suit, he bears the burden of proving his case, and he can be moved around because of the ostensible interest of people who may never appear in the courthouse.

Senator LEAHY. Are all suits in any forum subject to the mandatory transfer provision?

Mr. GOLD. That is the way I understand the bill, and indeed it applies to the courts of appeals which are very, very removed from indepth citizen participation. Normally, there are three judges, two lawyers, and a few law clerks; the discussion is a discussion about what a law means, and therefore narrowly focused. If the lawyer for the plaintiff is in Boston, the lawyer for the defendant is in Boston, why the case ought to necessarily move out to the 10th circuit because of some judgment that 31 percent of the people affected are in that circuit is one that I don't grasp.

Senator LEAHY. Incidentally, do any of your local unions ever bring suit against the Government on their own?

Mr. GOLD. Yes, as do international unions. There are international unions with their headquarters in Tennessee, in Denver, in Pittsburgh, and they have a tendency, as do we, to have sufficient confidence in the judiciary to normally bring the case at their headquarters or where the major problem is. They are more concerned about not being sent off to a distant place to litigate against the Government official who they have a complaint against than they are about who the district judge will be.

Senator LEAHY. Arguments have been made that S. 2419 might promote erosion of the national standards regarding health and safety of the Nation's labor force, particularly when it repeals exclusive venue provisions of a number of the health and safety and environmental statutes.

Do you have anything you want to say about that? Or do you accept that argument?

Mr. GOLD. I have great hesitancy about that argument; I have a feeling that the point is overdone on both sides. Groups like the one represented by the gentleman who preceded me are convinced that their won-lost record is going to go way up if this bill passes, and some of us who oppose it are overly concerned that it is going to have a large practical effect the other way. .

I am not certain that there will be such a consequence. The only thing that I am certain of is that we will be put to needless cost and expense by S. 2419 in trying to vindicate our rights when we are pushed to the extreme of bringing suits against the Government. I don't think that that is right. And we believe, because it is a special concern of ours, and it may not be a general concern, that it is unsound as a matter of principle to close the District of Columbia forum to plaintiffs who want to sue the Government here. It makes perfect sense if all the parties in the lawsuit are here, and it used to be, as I say, seen as making so much sense that it was the

only place you could sue--to permit such suits and not subject the plaintiff to dilatory and complicated removal issues.

Senator LEAHY. Thank you. Mr. Chairman, I have a number of questions for the record for some of the other witnesses, and some more material that I would like to place in the record, but I have to go back to the floor.

Senator DECONCINI. Fine, we will certainly make appropriate space for the questions to be inserted.

The Senator from Montana.

Senator BAUCUS. Mr. Chairman, thank you. Mr. Gold, isn't Washington, D.C., just as biased, if not more biased, than any other community in the country? I say that because judges pick up the Washington Post. The Washington Post is a Federal paper in the sense that it is a paper published here in Washington, D.C., and it advocates to some degree, I think, a Federal point of view. That's the way it gets subscribers, just like the Missoula in Missoula, Mont., advocates a Missoula point of view that helps get subscribers. The publisher and editor talk with local Rotary and Kiwanis clubs, and with the local folk, just like the Washington paper reporters talk to Washingtonians. So judges in Washington have their breakfasts and their lunches with Congressmen and Senators.

In many ways, isn't Washington, really a parochial town, a small town? Isn't there just as much of local bias in Washington as there is in other parts of the country?

Mr. GOLD. I think there may be such a bias here, and I guess inherent in your question is that there may be bias elsewhere.

Senator BAUCUS. What I am driving at is this: There is an assumption in many of these conversations that somehow Washington is somehow neutral; that it is somehow distant; that it is above the battle, somehow not biased; that it is objective. And my point is the contrary; that is, that Washington is probably in many ways just as biased; if not more; as other cities around the country. The people who live here spend time talking to other people who live here. And everybody wants power—the Federal Government generally wants power, those in Federal office want power. But it is also true that those in State government want power and control over their own affairs. States want to decide what's right for themselves just like those in Congress want to decide what's right for the country in general.

Don't you agree that there is just as much predilection on the part of judges in the District of Columbia to be influenced by local thinking as there is on the part of judges who reside in other parts of the country to be influenced by their local communities?

Mr. GOLD. I am willing to accept that post. I would suggest, though, one difference I have with you. All the judges in the ninth circuit come from and pretty typically have spent their legal careers in the States governed by the ninth circuit. The District of Columbia circuit is more heterogeneous. Judge Skelley Wright came to this court with a very different background than Judge Wilkey and Judge Robb; they are not localist in that way.

But I am not arguing against either random selection, where applicable and I am not arguing against concurrent venue in the ninth circuit and the District of Columbia circuit. I am only arguing that when the AFL-CIO as a national organization brings a

case concerning a nationwide matter and chooses for any of a host of reasons, including convenience, to bring it here, and the Government, the party we are suing, happens to be here—and we are disputing what a Federal law means—that the argument that 31 percent of the industries affected are in the ninth circuit shouldn't move the case out there.

That, it seems to me, is a different and narrower point than yours. If you are arguing that while historically, within reason, the plaintiff has had his choice, so long as he did not inconvenience the defendant, the venue rules should try to factor in the notion of who is the fairest in the land—whether it's the ninth circuit or the D.C. circuit or the fifth circuit, I think you are probably into some very difficult problems. With all deference, I think you would agree with me that not all those who are lobbying for this change in the law believe that the ninth circuit decides cases better in some abstract sense than the D. C. circuit; they are hoping they are going to win some cases they are losing now.

As I said, I am not positive that that is true, but that is a good part of this discussion.

Senator BAUCUS. I understand what you are saying. And I also tend to think it would be helpful for various interest groups located in Washington, D.C., to get out of Washington, D.C., a little more, and to litigate some of these cases in the hinterlands, in the parts of the country where the people are, to get to know those parts of the country and to understand them better.

I personally believe quite strongly that Washington, D.C., tends to be a somewhat incestuous community. It's small, and people talk among themselves all the time. And I also believe it would be better for the country and for those of us who hold representative office, those of us who work for various organizations, and those of us who are attorneys with the Government to get out of Washington more and see what's going on in more of the country. Now that's an easy thing to say, and it may sound trite, but my personal experience in Montana and in other areas outside Washington has been crucial to me, and I think that is a very important matter to——.

Mr. GOLD. We have members in every State; they ask that their interests in health and safety and in the labor laws be advanced and protected. Very few of them are terribly upset if in vindicating their interests we litigate here rather than elsewhere.

But the one thing they do want is the understanding that they will be just as healthy and just as safe in Arizona as in Vermont, and that they will have the same labor laws apply to them in both those States, and in Montana, too. And they are willing to entrust it to us to try to advance those interests in sound and uniform law. They take no pride in losing a case in the fifth circuit if they happen to live there because that is where the company wanted the case brought, and the companies drew the hostile-to-labor panel they hoped for. And I think in many instances the questions about where the law will develop best and how the law will develop best are best left to the development by different people making choices in their own interest. I think the venue laws are best seen as laws which permit the parties to settle their dispute in a court without inflicting needless pain on each other by dragging one side or the

other across the country, and not as a means of finding the "proper local milieu," which is usually shorthand for a "forum where I hope I will win."

Senator BAUCUS. I appreciate that. We could probably carry this conversation on forever, Mr. Gold, but there are other witnesses. Thank you.

Mr. GOLD. Thank you very much.

[Prepared statement of Laurence Gold follows:]

STATEMENT OF LAURENCE GOLD, SPECIAL COUNSEL,
AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
BEFORE THE COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE,
ON S. 2419

MAY 13, 1982

Mr. Chairman, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) appreciates this opportunity to state its views on S. 2419. In essence we believe that it should not be made more difficult than it is now for plaintiffs suing the Federal Government to choose a forum convenient to the plaintiff and that the question of the proper forum should not be subject to complex, uncertain expensive and time-consuming litigation. S. 2419 is, in our view, defective on both these counts and we therefore oppose its enactment.

Before turning to the AFL-CIO's particular concerns, I wish to note two preliminary points. First, the venue rules, as we understand them, are designed to provide the plaintiff — the party who is seeking to vindicate his rights as granted by the law and who bears the burden of establishing those rights — a measure of choice consistent with the interests of the defendant in selecting the forum . That, we submit, is an eminently sensible and straight-forward approach. It will not be improved by attempting to circumscribe the plaintiff's options in order to factor in the interests of potential intervenors, or of those who are affected by the case but are not even litigants. Second, it is our understanding that S. 2419 reflects concern over a perceived imbalance between the number of suits concerning environmental quality brought in the District of Columbia courts and those brought elsewhere. But a compilation of civil cases filed against United States' defendants for the 12-month period ending September 30, 1981 provided to us shows that of 250 such cases only 30, or 13.6%, were brought in the District of Columbia. That does not appear to be a sufficient predicate for the far-reaching charges proposed in S. 2419.

With those preliminaries to one side, I wish now to turn to what we see as the harmful effects of S. 2419 on AFL-CIO litigation against the Federal Government. Much of that litigation is in the Courts of Appeals and normally it concerns agency action having a nationwide effect such as safety and health standards issued by the Secretary of Labor or decisions of the National Labor Relations Board. Because the Federation's headquarters is in the District of Columbia, it is convenient for us to seek review of such agency actions in the District of Columbia Circuit. And because the agency and its lawyers as well are typically located in Washington, from the standpoint of public policy the D.C. Circuit is an entirely appropriate forum. Nonetheless, S. 2419 provides that the Courts of Appeals

> "shall, upon motion by any party thereto, transfer such proceeding to the court of appeals for a circuit in which the action under review would have a substantially greater impact, unless the interests of justice require the court to —
>
> "(A) retain such proceedings, or
>
> "(B) transfer the proceedings to a circuit other than one in which the impact would be substantially greater."

We have two objections.

First, as I have already indicated, we believe that litigants should have the right where it is convenient for them and for the Government to bring suit against the Government in the Nation's Capital. Certainly that ought to be permitted with regard to any agency action having nationwide effect. Indeed, prior to the last significant change in the venue rules, suits against the Federal Government were required to be brought in Washington. It goes too far in the other direction, we submit, to bar the use of this uniquely national forum for cases of national effect.

Second, litigation is already too complex, time-consuming and expensive. We do not believe that a bad situation should be made worse by requiring a preliminary ruling as to what part of the country, if any, will feel the greatest impact of the action being challenged and whether that impact is substantially greater than that felt elsewhere. If I may borrow the language of those who style themselves as regulatory reformers, the costs of making such a determination are certain to outweigh any potential benefits. This would be true even if the "substantially greater impact" concept were capable of sure, uniform application. But, in fact, it is not. In many instances, a ruling at the preliminary stage on potential impact will be little more than a guess based on incomplete and unreliable information.

Our objections apply equally to section 4 of S. 2419 which would impose the same requirement on the district courts.

While the AFL-CIO has a markedly lesser involvement in district court litigation, my remarks to this point foreshadow our reaction to the proposal to limit venue to the judicial district in which "the agency action or failure to act that is the subject of the lawsuit would substantially affect the [district's] residents." Again, our concern is that this would preclude use of the District of Columbia courts for litigation that has effects throughout much of the Nation but by happenstance, not on the residents of the Capital. Obviously if a case affects residents of Maine, New Jersey and Oregon but not those of Washington, D.C. as happened in one suit we brought against the Department of Labor last year, the District of Columbia is as rational a forum as any. We see no reason for precluding such a suit and forcing the parties to bear the added costs of litigating elsewhere.

Senator DECONCINI. Thank you very much, Mr. Gold. The next witnesses will be Mr. Ernest Gellhorn, University of Virginia College of Law, and Mr. Cass Sunstein, University of Chicago College of Law.

STATEMENTS OF ERNEST GELLHORN, UNIVERSITY OF VIRGINIA COLLEGE OF LAW, AND CASS SUNSTEIN, UNIVERSITY OF CHICAGO COLLEGE OF LAW

Mr. SUNSTEIN. Mr. Chairman, members of the committee, I am grateful for the opportunity to be here today to talk to you about the important questions raised by S. 2419. I will be speaking in opposition to the bill. Although I think that the purposes and the principles that underlie are it at the least laudable, the bill probably will not serve those purposes, but instead impose very significant costs and burdens that are not matched by compensating benefits.

I am sure the committee is aware that the historic purpose of venue provisions is to promote convenience and to minimize the social and individual costs of litigation. In accordance with those ideas, convenience is evaluated in terms of the interests of the parties and witnesses, although certain other factors are taken into account as well.

The interest of the plaintiff is a matter of primary importance. In the American judicial system, the plaintiff is traditionally accorded a great deal of leeway in choosing the place of the litigation. Countervailing factors have to be pretty powerful in order to justify overcoming the plaintiff's choice. Those countervailing factors may be invoked by a defendant or by an intervenor in the sorts of cases that you are concerned about.

The current venue provisions for cases in which an officer, employee, or agency of the United States is a defendant follow traditional venue rules fairly well. They allow the suit to be brought where the plaintiff resides. If it's a local controversy in Arizona and the plaintiff is in Arizona, he can bring the suit there. He can also bring the suit where the defendant resides, which will, of course, usually be the District of Columbia, since the defendant will be sued in his official capacity. The plaintiff isn't required to bring suit in the District of Columbia, a fact which is sometimes disregarded by proponents of this bill. At the same time, the plaintiff does not have the final say; the suit can be transferred if the plaintiff wants to transfer it after he has started, if the defendant wants to transfer it, or even if an intervenor wants to transfer it. This system undoubtedly results in some injustices but in general it is a convenient and coherent system which I think should be changed, if at all, at the margins.

The bill you are now considering, in my view, would impose significant costs in terms of the burdens of litigation, would impede the efforts of plaintiffs and defendants to resolve litigation expeditiously, and would also cause considerable uncertainty, which is one thing the judicial system does not need.

The principal effect of the bill would be to bar the plaintiff from suing in the District of Columbia even if the plaintiff wants to do

so—indeed, even if there is no one in the lawsuit who doesn't want the case to be tried in the District.

Now, the statistical data doesn't have to be analyzed with much care in order to recognize that this could impose very significant costs. Representatives of the U.S. Government, primarily Justice Department attorneys, will be required to travel all over the country to defend lawsuits. Documents and other evidence will also have to be transported.

Now, Assistant Attorney General Dinkins hasn't studied the statistics, but it is possible that the costs will be very substantial, and a taxpayer burden of that sort, I think, has to be identified before one can be sure that this bill is a good idea.

Now, if those burdens could be justified as a means of protecting the plaintiff's choice of forum, I think the bill might be supportable. That justification can't be made. By hypothesis, the plaintiff wants these lawsuits to be tried in the District. This kind of result, hostile both to the plaintiff's and the defendant's choice, would be unprecedented in the Anglo-American law of venue.

There is a third set of costs which have been touched upon earlier, and those are the costs imposed by enacting new and ambiguous provisions into law. It is critical to formulate venue provisions as clearly and simply as possible in order to minimize unproductive litigation at the threshhold. These provisions require a determination of where it is that residents will be substantially affected by the agency action or failure to act. Those are very vague terms, ambiguities that can prove especially vexing in the not infrequent cases in which agency action has multi-state effects.

So the costs of the proposal fall in three categories: One, costs of plaintiffs who want the lawsuit in the District, two, costs to the government and transportation costs, and three, costs to the judicial system in figuring out what these new terms mean.

Now, those costs aren't so high that one couldn't support the bill if it were in fact justified by its purported rationale, but I don't believe that it is in fact.

The first justification promoting citizen participation and local control is a laudable one. But it is hard to believe that changing venue rules is going to serve that purpose. The Government decision will in all likelihood have been made in the District of Columbia; the decision is going to be upheld or struck down by a Federal court. The court's decision is going to be determined on the basis of questions of Federal law, not local law. Since the issues are Federal ones, they ought to be uniform nationwide. By hypothesis, that was Congress decision in passing a national law.

So I don't understand how local control will meaningfully be promoted by this bill.

Now, citizen participation is an important goal, but in lawsuits the questions are very different from those in an administrative agency or in a legislature; these are courthouses, not town meetings. In courthouses, citizens at large may not participate. So I don't know how citizen control will be promoted.

Now, the second justification for the bill draws on the problem posed by multiple parties. It might be the case that in some of these lawsuits there will be intervenors, affected local citizens who don't want to have to travel to the District of Columbia. That

seems to me to be an important justification in some cases, but it doesn't justify this bill. First, one has to justify giving intervenors a veto power over the wishes of both plaintiffs and defendants. To give such veto power seems inconsistent with the traditional principles underlying venue. Second, this bill does not bar suit in the District only when there is an intervenor who wants the suit to be tried locally; it applies when there is no intervenor at all, or even when an intervenor wants the lawsuit to be tried in the District. Third, if there are legitimate interests on the part of intervenors, the result should be changed not by flatly precluding suit in the District of Columbia, but by changing the law so as to encourage transfer when there is a preferable alternative forum. Such transfer is, of course, available under current law.

The final justification for the bill rests on the value of decentralized decisionmaking, which is certainly a legitimate concern. On the other hand, it is not the case that all administrative law actions are currently tried in the District of Columbia. Under existing law, numerous cases are tried in places other than the District of Columbia circuit. To the extent that the District of Columbia circuit hears a disproportionate number of administrative law cases, that is only because that circuit is the most convenient place for the forums, and no other party has been able to convince the court to transfer the case. Under conventional venue rules, the case should therefore be held there.

For these reasons, it seems to me that the justifications for the bill are weak and outweighed by the costs and burdens that would be imposed.

Now, rather than ending on an entirely negative note, I might suggest that some of the concerns voiced by the bill's proponents and by Senator Leahy seem to me to have merit. And the burdens and the costs of the bill could be minimized by redrawing it in much narrower terms. The narrower terms would encourage transfer in cases where local control seems desirable or to promote something like a presumption in favor of transfer. What bothers me most about this bill is its across-the-board approach, which bars litigation in the District of Columbia when everyone is content to have the lawsuit tried there.

Senator DECONCINI. Mr. Gellhorn.

Mr. GELLHORN. Mr. Chairman, I am delighted to be here, particularly as a law teacher to see a Senate committee focusing on such, a narrow and important but also, to me, interesting question of law which is not necessarily the usual focus of a Senate committee.

Senator DECONCINI. Mr. Gellhorn, let me congratulate you. I understand you have a new appointment, to the deanship of the Case Western Reserve Law School?

Mr. GELLHORN. Yes, sir.

Senator DECONCINI. We regret you are no longer in Arizona but would like to compliment you on the fine job you did there for Arizona State University. That law school has become nationally known, and a great deal of the credit goes to you.

Mr. GELLHORN. Thank you very much.

Senator DECONCINI. We miss you.

Mr. GELLHORN. I have a lot of affection for the people at that institution and appreciation for the support you and others gave me while I was there.

Senator DECONCINI. Please proceed. I am going to have to leave in about 4 or 5 minutes to go cast a vote on the floor, but I will interrupt at that time. Please go ahead.

Mr. GELLHORN. I would like to submit my statement for the record, and perhaps focus on one or two items of interest.

Senator DECONCINI. We will put it in the record.

Mr. GELLHORN. This proposal, it seems to me, represents a sharp break with the tradition of the location of venue. It would eliminate the primary focus on the interest and convenience of the parties, and add a new test namely whether a substantial impact on local interest is present—for determining venue in those actions where there is to be a challenge to Government rules.

On the other hand, as I read the statute, there is no change in the operation of the rule of the law of venue, that the plaintiff to the lawsuit picks the location, and only if there is a motion by a party is it then to be moved. This legislation reflects an intense concern that local interests be taken into account in the trial of lawsuits. If it, in fact, accomplished that objective, I might be a supporter of the legislation. And I think it could be done.

However, I am persuaded that as drafted the bill in fact does not accomplish what the sponsors seek, and instead may add some problems, some of which may not be fully ventilated here today.

Let me first suggest how I think the goal which you are seeking, Mr. Chairman, might be accomplished in the alternative to that proposed here.

First it seems to me that one could simply just add a factor to section 1391(e) and particularly to section 1404(a) of title 28 of the United States Code, to take into account whether or not the action involves a substantial local interest and to favor the location of a case in that district, if that is the situation.

Second, in order to correct what I consider to be a disability of the current proposal, it should be made clear that intervenors have the power to submit motions for changes of venue. For as I understand the current case law, intervenors are not permitted that power. That is not corrected by the current legislation, and therefore I would suggest that unless that is added, this may be a fair amount of talk, but with probably very little impact.

Another thing I would like to do is raise some questions about the bill as it is currently drafted.

What it does, it seems to me, is elevate local interests above the interests of the parties, and I would raise the serious question as to whether or not that is desirable. I would think it is correct to assert that local interests are important and ought to be considered in the location of the case. But to make them the dominant concern, without regard to other interests—except for the indeterminate language left in 1404(a) that the "interests of justice," must be served—is it an inadequate instruction to the courts. I would instead suggest that you retain the "convenience of the parties" as a factor to be considered. The cost of litigation, as well as the cost to Government, of an inconvenient forum are not something that we ought to ignore. And as I understand the terminology "interests of

justice," they do not necessarily include in the terminology meaning.

In addition, I think it is easy to lose sight of the fact that the interests of the parties are substantial and are the equivalent of local interests in determining the location of a trial. I believe they are relevant, they have been historically relied upon, and I would urge that we break with the past only consciously, only when we are certain of our result.

I would also suggest that there are advantages revealed from our experience with the current rule. I come to this proceeding as a reader of administrative law opinions. While I acknowledge the fact that judges throughout the country do a conscientious job, I think there are some advantages from seeing the same type of case more than once. On the average, the administrative law opinions prepared by the judges in the D.C. circuit do reflect the advantages of experience while also retaining some of the advantages of being a general court rather than a specialized one.

The final point I would make is that, as drafted, the bill is too ambiguous, possibly impractical, and probably ineffective. What does it mean by "substantially affecting" a local interest cannot be assessed in advance. Take an example used to justify this bill as submitted. If a decision of the Federal Government affects the profitability of offshore fisheries, would a district which has a seafood processing plant be one who has a substantial interest, and if it is a substantial local interest, how do we compare the interests of the fishermen on the boats versus the employees in the plants? Do we take into account the interests of the stockholders, of the suppliers, of the taxpayers of the community that the seafood processing plant is no longer as profitable? In other words, this bill could generate a new area of litigation which would add complexity and unnecessary cost to litigation.

I am not suggesting that taking substantial local interests into account in deciding venue is inappropriate. I think it is appropriate if it is relevant to the lawsuit. But to force the courts to make the determination as to where the greater impact is, or what is a substantial impact, seems to me to add an unnecessary issue in the case.

Another concern I have is that the effort to exclude civil rights cases from the impact of this legislation may not necessarily be effective. It appears, at least from the effort to develop a legislative history, to be limited to actions brought under section 1981, et seq., of the United States Code. However, many reviews of administrative action involving civil rights are challenges, for example, to rulings issued by the Equal Employment Opportunity Commission, or challenges by the Departments of Health and Human Services, Labor and Education.

Senator DECONCINI. Dean Gellhorn, excuse me, I am going to have to take a short recess now to go vote. I will be back in about 7 minutes. You can stay right there, if you like.

[Brief recess.]

Senator DECONCINI. The committee will come to order. Excuse me, gentlemen, I realize I was a bit more than 7 minutes; as you could see, there was another vote.

Professor Gellhorn, please continue with your remarks.

Mr. GELLHORN. I have just two more things to add, Mr. Chairman.

First, as I understand the current law of venue, perhaps not fully reflective of the practice, but at least the written case law as reflected in the treatises, intervenors are without authority to make motions for venue. The case I have a copy of in front of me, Trans-World Airlines versus the Civil Aeronautics Board, reflects that as a holding of the court. And the current bill, as drafted, does not expressly address that issue. If this case law continues, then intervenors would not be in a position to seek a change in venue to that court where local interests would be substantially affected. If the objective of this bill is to be achieved, it should be modified in that regard.

The final point I would seek to note is that my basic objection to this amendment to the venue law is somewhat broader than what I have stated so far. It is simply that the concern which this bill reflects is a concern that the statutes of the United States, particularly some of the environmental statutes and their regulations, do not specify that local interests are to be taken into account. I am not in a position to say that that is desirable or undesirable. But it does seem to me to be inappropriate and undesirable to rely on a procedural device to correct what is perceived to be a substantive failure of the statute.

What the Congress has done, and continues, I think, to do, is to write broad and often vague general statutes. I would urge that the substantive statute should be written more precisely, and if local interests are important in particular matters that they should be outlined as an element or an overriding factor to be taken into account. Then it would follow that local interests would be important in deciding venue. What this statute does instead is to seek to accomplish that result through a procedural change. As a consequence, it takes a more costly way to make this change and it may not be fully effective. In addition, if ultimately the substantive statute is corrected, then we are stuck with the procedural barriers that we are now creating, and they will probably be resistant to change.

As a teacher of administrative law, I constantly urge my students to pay attention to the underlying substantive law in trying to understand the procedural rules.

This legislation, I would suggest, may reflect that continuing difficulty with much administrative law, and therefore I would urge serious reconsideration of some of its provisions before it is enacted.

Senator DECONCINI. Thank you, Professor Gellhorn. You raise the question of intervenors, and it is a very appropriate one. In the bill before you, in section 1404(e)(2)(E), there is a statement that says "Upon motion of any party thereto, transfer of the action to a district or division where the action might have been brought and in which the action would have a substantial greater impact, unless the interests of justice requires it, any party * * *." Would it be your interpretation that that would not include intervenors under any circumstances?

Mr. GELLHORN. It's my understanding that the same terminology is currently in 1404(a), and that that term was also in the statute

at the time the Trans-World Airline case was decided. The court there did not feel constrained, despite that language, to say that intervenors were parties within the meaning of 1404(a). So unless Congress were more explicit by statute, I do not think you would accomplish the objective.

Senator DECONCINI. You think we could add something in that section that would satisfy the decisions that you cite there?

Mr. GELLHORN. Yes, I think one could just make the express statement that a party shall include a person added to the litigation as an intervenor.

Senator DECONCINI. Thank you for that assistance. Your colleague, Professor Gellhorn, Prof. Daniel Meador, stated that he favors the idea of placing litigation challenging Government action in the Federal district or districts where such action has a significant impact or inflicts significant injury. I counseled with Professor Meador when he was here at the Justice Department. I can't say that he is the one that convinced me to introduce this legislation, but he seemed to be a very thoughtful person who was brought onboard during the past administration. He struck me as being one who had a real indepth knowledge, and he convinced me, and I think other Members, that this was a proper way to go.

Do you reject his viewpoint, or would you offer any suggestions on changes of this particular bill before us that could accomplish what Dean Meador made reference to?

Mr. GELLHORN. The difference that I have with both this legislation and I suppose with my colleague, Dan Meador, is that it would substantially affect the local interest test as the overriding consideration for venue except in those situations where the "interests of justice" are shown to be impaired by that kind of a transfer. That raises this local interest to too high a level, and suggests, by the removal of the convenience of the parties criterion, that the interests of the parties ought not to be considered by the court. I think that violates both tradition and commonsense.

My argument is not against consideration of local interests. I think it is relevant, particularly if the substantive statute under consideration makes it critical. All I am pleading for is that the interests of the parties be on at least the same level. It seems to me that the local interest does not override the interests of the parties, but is a relevant factor.

Senator DECONCINI. You think the phrase "unless the interests of justice requires" the court to consider this in another jurisdiction, is not sufficient direction or leeway for the court to make an interpretation that this is not just something of local interest that ought to be decided in the district of Idaho or the district of Arizona, but should go on. Would you suggest that if we do enact something like this, that we spell it out in different terms? That as it presently reads; it is just not direct enough?

Mr. GELLHORN. The excision of the words "convenience of the parties" seems to me to provide a strong signal to the courts that the convenience of the parties is no longer to be considered, especially since the current legislation provides for both the convenience of the parties and the interests of justice.

I would suggest that if we're to add to the words "for the convenience of the parties," something to the effect of looking toward the

substantial local impact, that then you would be telling the court to balance these several factors. And I would not be able to predict what the impact of that kind of a modification would be, but I would suggest that it is at least more reasonable; it is more reflective of the interest that you are trying to project.

Senator DECONCINI. The reason we don't have that in there—maybe we should consider it—is that I was not overly concerned about the convenience of the Government, realizing it's a party. I was not overly concerned about the convenience of the Government because of its massiveness, because it has district attorneys and Federal employees available in every district court, and also because its resources are usually greater than individuals, plaintiffs or defendants, and certainly witnesses. That is why that is not in there.

I have a problem with the burden that we place on the witnesses, and the cost of litigating the cases here. Professor Sunstein, are you familiar with the *Salt River* case?

Mr. SUNSTEIN. I am after discussions earlier today.

Senator DECONCINI. In that case, transferred to Arizona by Judge Flannery, the plaintiff argued that only in the District of Columbia could they "rely securely on the detached and dispassionate adjudication of Federal actions which are alleged to have consistently favored influential and dominant Arizona interests." They then suggested that the local court might suffer from "subconscious leanings in favor of a dominant local interest."

Do you agree that it is that difficult to get an impartial hearing from a Federal judge outside the District of Columbia?

Mr. SUNSTEIN. Oh, no, I agree with you entirely on that; I think that there is no reason to presume that district judges in the District of Columbia are any more impartial than district judges in Arizona or Massachusetts or Connecticut.

Senator DECONCINI. OK, then let me ask you the followup question. You say that if we are to change this, there has to be overwhelming or a very impressive need to consider something greater than the plaintiff's interest in where they can file. What would justify that in your mind?

Mr. SUNSTEIN. To overcome the plaintiff's interest?

Senator DECONCINI. Yes, to overcome the availability of having the plaintiff file it where it's most convenient to the plaintiff.

Mr. SUNSTEIN. If it is the case that the defendant's interest, the Government, or the intervenor's interest are very significant, and if the lawsuit would be more conveniently tried elsewhere, I think the case should be transferred elsewhere. And I believe the judge did transfer the case you are talking about, notwithstanding the plaintiff's unimpressive argument about the bias of the Arizona judges.

So I do agree with you, the plaintiff's choice of forum shouldn't be conclusive. Also I support the conception underlying this bill to the effect that the case ought to be transferred if there is a genuine local impact, a distinctively local impact, and if the interests of the defendant and the intervenors call for transfer. I think that's correct.

What bothers me is the across-the-board, inflexible nature of the bill. It would require transfer even if everyone is content that the

case be held in the District of Columbia. That might prove a disincentive for plaintiffs to file suit in the District of Columbia, because it is not permitted under this bill, even though the Government would be delighted that it be held there, and even though any intervenors would be delighted it be held there.

Senator DECONCINI. What if Judge Flannery had not moved the case to the district of Arizona. That would have been a real tragedy. It has happened before, where the witnesses have had to come to Washington, D.C., from Arizona to try a case that totally is involved with the water rights in Arizona. I am just trying to resolve in my own mind whether you leave it like it is, whether it is exercised 10 percent of the time or 90 percent of the time, or when you should shift the burden over if the interest of justice requires it be moved away from the district where it occurred. That's the dilemma I find myself in, and I am not convinced yours is any better than mine, and, quite frankly, I am not positive mine is any better than yours.

Mr. SUNSTEIN. Well, I don't know enough about the examples of cases where the cases ought to be tried locally aren't tried locally. I don't even know if there are a number of examples of that. Assistant Attorney General Dinkins referred to one or two. Before changing the law, one ought to find out whether it is a very significant problem. If it is a significant problem, then I am with you to the extent that you want local cases to be tried locally. I think in order to write such a bill, one needn't be as inflexible as this bill is; one could say something to the effect that it is an important consideration, if there is a distinctively local impact, that a district judge has to consider that. Or you even could say that that is something to be reviewed by the appellate court. I think a direction of that sort would be likely to minimize the kind of problems you are concerned about, and also the kind of problems I am concerned about, which are the cases where everyone wants to be in the District of Columbia, where everyone is content that it be tried there, and when you have to waste taxpayer money and plaintiff money, whether the plaintiff be a corporation or a public interest group, by forcing them to fly all over the country.

Senator DECONCINI. You have a kind of tradeoff where you either force the public interest group to fly all over the country, or you force the witnesses from a distant State to fly into the District of Columbia because the plaintiff chooses that forum for his convenience.

Mr. SUNSTEIN. Well, if there are witnesses who—in most administrative review actions there are no witnesses—if there are witnesses who are going to have to be flown from Arizona to Washington, then that is a consideration under current law that the District judge has to consider, so I think current law does accommodate that, though maybe not perfectly. The sorts of concern you identify are legitimate ones. My worry is that this bill is such an across-the-board approach it applies where there aren't witnesses, where there aren't intervenors, when both plaintiff and defendant are content with having the case in the District of Columbia—to bar that seems to me inconsistent with the Anglo-American law of venue.

Senator DECONCINI. Thank you, gentlemen, you are very helpful. I appreciate your testimony, and I am sorry to have kept you waiting so long.

We will now have the panel of Nicholas Yost, Environmental Law Institute; Patrick Parenteau, National Wildlife Federation; and Robert Blacher, Terris & Sunderland.

Gentlemen, thank you for waiting; we are sorry to have kept you for so long. Your full statements, without objection, will appear in the record.

[Prepared statements and responses to questions submitted Senator Leahy follow:]

PREPARED STATEMENT OF CASS R. SUNSTEIN, ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF CHICAGO

Mr. Chairman and Members of the Senate Judiciary Committee:

I am grateful for the opportunity to appear before this Committee to discuss the important question of venue in cases in which an employee, officer, or agency of the United States is defendant. I will be speaking in opposition to the bill before you today. Although the purposes which the bill is designed to serve are laudable, I believe that the bill would not in fact serve those purposes. On the contrary, it would impose on both taxpayers and litigants very substantial costs and burdens that are not matched by compensating benefits.

I should like to begin by making some brief general remarks on the function of venue provisions. Historically, the concept of venue has served to ensure that proceedings are held in the most convenient forum.[1] Unlike jurisdiction, venue has nothing to do with the power of the court to hear the case. Convenience is to be evaluated primarily in terms of the interests of the parties and witnesses, although other factors may be relevant as well.[2]

In assessing convenience, it is appropriate to take into account the location of the witnesses and of the relevant evidence, with a view toward minimizing the social and individual burdens of litigation. These considerations assume special force

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[1] See generally 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 3801-3802 (1976); Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165 (1939); Denver & R.G. W.R. Co. v. Brotherhood of R.R. Trainmen, 387 U.S. 556 (1967).

[2] See Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

nowadays, when the complexity and costs of litigation--especially litigation involving the government--are so great.[3]

In designing venue rules, the interest of the plaintiff is a matter of primary importance. In the American judicial system, the plaintiff has traditionally been accorded considerable leeway in choosing the place of the litigation. Among the various possible forums, the one chosen by the plaintiff is presumed to be permissible, and may be disturbed only by strong countervailing factors.

The traditional rules for venue have been based on considerations of this sort. When real property is involved, venue is ordinarily held proper where the property is located. If real property is not involved, venue is proper where the plaintiff resides, where the defendant resides, or where the claim arose. These are the three locations in which considerations of convenience, broadly understood, are most likely to justify trial.

Federal provisions for venue follow these traditional principles.[4] Specifically, the current venue provisions for actions in which an employee, officer, or agency of United States is a defendant allow the suit to be brought where the plaintiff or the defendant resides, or where the cause of action arose. The defendants -- as agents of the United States -- reside in the District of Columbia. The District may well be the most

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[3] See Stewart & Sunstein, Public Programs and Private Rights, 95 Harv. L. Rev. 1193, 1278, 1293-94 (1982).

[4] See 28 U.S.C. §§ 1391 & 1404.

convenient place for holding the litigation. But under current law, the plaintiff is not required to institute proceedings in the District. He may bring the action where he resides--frequently a convenient place as well. This solution effectively accommodates the interests of both plaintiffs and defendants.

The current provisions do not authorize the plaintiff to have a final say on where the suit may be brought. Under the transfer provisions,[5] the case may be resolved elsewhere if the plaintiff, the defendant, or even an intervener can show that there is a more convenient forum. For example, if the plaintiff brings suit in the District to challenge governmental action, but if the witnesses and evidence are in Arizona, the lawsuit may be transferred to Arizona--notwithstanding the fact that the plaintiff initiated the suit in the District. The current federal provisions for venue thus promote a workable and coherent system for determining where actions against federal employees may be brought; and those provisions respond to the traditional purposes of venue rules.

By contrast, the bill you are now considering would increase the expense of litigation, impose substantial burdens on both plaintiffs and defendants, and cause considerable uncertainty. The principal effect of the bill would be to bar the plaintiff from bringing suit in the District of Columbia--even if the

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[5] 28 U.S.C. § 1404.

plaintiff wants to do so.[6] One need not analyze the statistical data with much care in order to recognize that this proposal would impose enormous costs. If the proposal is adopted, representatives of the United States government--primarily, Justice Department attorneys--will be required to travel all over the country to defend lawsuits. Documents and other evidence will similarly have to be transported. These are very significant burdens in terms of time as well as money.

Such burdens cannot be justified as a means of protecting the plaintiff's choice of forum. By hypothesis, the plaintiff as well wants these lawsuits to be tried in the District of Columbia. The inconvenience will thus burden not only the government, but the plaintiff as well. The plaintiff too will have to venture far from his preferred forum in order to undertake his own lawsuit. This result would, I believe, be unprecedented in Anglo-American law of venue.

An additional cost, which is too easily underestimated, is the burden imposed by enacting new and ambiguous provisions into law. Venue rules should be drawn as simply and clearly as possible, so as to minimize unproductive litigation concerning its meaning.[7] But the proposed venue rules would produce

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[6] It is sometimes suggested that the bill would conform to the purposes of the Mandamus and Venue Act of 1962, 76 Stat. 744, which broadened venue in cases against federal officials by allowing the plaintiff to sue in places other than the District of Columbia. The bill would, however, undermine rather than promote the purposes of the 1962 statute, which was to increase the plaintiff's options and promote convenience. The current bill would decrease the plaintiff's options, forbidding suit in the District even where that is the most convenient place to conduct the litigation.

considerable uncertainty. They would, for example, require courts to determine where it is that "the residents would be substantially affected by the agency action or failure to act." This determination will in turn require definition of the vague terms "substantial" and "affect"--ambiguities that will prove especially vexing in the not infrequent cases in which agency actions have multistate effects. It is possible that the courts will eventually work out sensible and uniform solutions to such interpretive questions, but significant burdens will result from the effort.

These, then, are the disadvantages of the proposal: the costs--in terms of time and money--to be incurred by the government in transporting its attorneys to an inconvenient forum; the costs of transporting any relevant evidence and witnesses; the costs of imposing similar burdrens on the plaintiff, and of denying him his traditional choice of forum; and the costs of attempting to divine precisely what the new terms of the statute mean. It is fair, I believe, to predict that these costs will in the aggregate prove substantial.

Any proposal that imposes such significant burdens, and that is so plainly inconsistent with the ordinary purposes of venue provisions, carries a very heavy burden of justification. I do not believe that that burden is met here. I am aware of three justifications for the proposal. None is persuasive.

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[7] See generally D. Currie, Venue and the Sagebrush Rebellion, in Venue at the Crossroads 65 (1982) (S. Schesinger ed.).

A. Citizen participation and local control. It is sometimes said that litigation with the federal government should be removed from Washington in order to promote local control and increase citizen participation and confidence in government decisionmaking. It is commendable that Congress, and this Committee, has taken interest in these considerations in the past year or so.

But it is hard to believe that changing the current venue rules would serve this purpose in any meaningful way. The government decision under challenge will probably have been made in the District, and the decision will be upheld or invalidated by a federal court. The court's decision will depend on questions of law; and those questions are federal rather than local. It is thus hard to imagine how local control or citizen participation will be promoted by litigating the case in closer proximity to affected citizens.

This argument for the bill is sometimes coupled with the idea that it decreases "forum-shopping." In the Anglo-American judicial system, however, the plaintiff is permitted to choose among the possible convenient courts--subject, of course, to dismissal or transfer if the plaintiff's choice is designed to harass or if there is a preferable alternative. There is no reason why this fundamental precept should not be followed in the context of judicial review of administrative action. And any problems of "races to the courthouse" should not be solved by eliminating the best available forum.

B. Multiple parties. In the typical administrative law case, there is not simply one plaintiff and one defendant; frequently others are affected and intervene in the proceeding. The proposed bill is sometimes justified on the ground that interveners should not be forced to try lawsuits in the District of Columbia when they in fact reside elsewhere.

This justification is also unpersuasive. Interveners have never given a veto power over the desires of plaintiffs and defendants; if the plaintiff and defendant want the action to be tried in the District, it is hard to understand why the action must be tried elsewhere simply because some third party so wishes. Moreover, any legitimate interests of interveners should be taken into account, not by flatly precluding suit in the District of Columbia, but by allowing transfer when there is an alternative forum that is clearly preferable. That device is of course available under current law.

C. More decentralized decisionmaking. The proposed venue changes have been supported on the ground that under current law, too much power is concentrated in one court of appeals--the Court of Appeals for the District of Columbia Circuit. These provisions, it is said, would provide a remedy by ensuring that questions of administrative law are dispersed throughout the country.

This is a legitimate concern, for one of the primary virtues of the federal system is the independence and lack of specialization of federal judges. But I do not believe that this concern justifies the bill. Under current law, administrative

law decisions are made time and again by courts other than the District of Columbia Circuit. If the plaintiff wants to have the case heard elsewhere, he is permitted to do so. The Federal Reporter is filled with administrative law decisions made by different courts of appeals. For example, in the twelve-month period ending June 30, 1978, only 37 of 519 environmental cases filed in District Courts were brought in the District of Columbia; and only 33 of 155 were filed in the Court of Appeals for the District. It is important, then, not to rely on anecdotal evidence to exaggerate the power of the District of Columbia Circuit.

The D.C. Circuit may well hear a disproportionately large number of administrative law cases. But to the extent that this is so, it is because the D.C. Circuit is the most convenient forum for the parties. Under conventional venue rules, the case should therefore be held there.

The proposed bill is sometimes justified on the related ground that it would remove important decisions from a "liberal" court. Venue rules should not, however, be based on the short-term composition of a particular court. President Reagan has recently appointed one judge to the D.C. Circuit, and he will undoubtedly have opportunities to appoint others. For Congress to alter venue rules to meet shifting perceptions of which courts are "liberal" and which "conservative" is to degrade the historic functions of venue provisions.

In short, the justifications for the bill seem to me weak or non-existent. To the extent that they have force, they are

outweighed by the costs and burdens the bill would impose. Some of the purposes of the bill are laudable, but they would not in fact be served by its adoption.

Venue rules should be and have been an effort to channel litigation into the most convenient forum. Commendably, the Congress has historically adhered to this basic principle, enacting venue provisions on the basis of considerations of fairness and convenience. It would be unfortunate indeed if this bill were to become an exception to that practice.

QUESTIONS SUBMITTED BY SENATOR LEAHY

1. a. Would the strict review of an agency regulation based on a certified record differ markedly depending on the court?

   b. What are the pros and cons of relocating such a review, especially in the case of nationwide standards?

2. How do you feel about the assertion in the AEI editorial that there are neither local judges, nor local issues and that to think otherwise is "False Federalism"?

3. a. Is it fair to expect regionalized application of supposedly national law under S. 2419?

   b. What effect might that have on national regulatory programs?

4. a. Could S. 2419 be characterized as making venue more defendant oriented? To what degree does S. 2419 alter the notion that the plaintiff's choice of forum should be preserved?

   b. Currently, the law favors the plaintiff's choice of forum to facilitate access to the courts. What effect might this legislation have on the actual number of suits filed?

5. a. How do you feel about the apparent presumption of S. 2419 that transfer is mandatory upon motion of any party?

   b. Is there arguably such a presumption even present?

   c. On what party would the burden of proof lie?

6. a. The "shall transfer" language appears in provisions governing both the federal circuit and district courts. How do you feel about reducing and almost eliminating court discretion in such matters?

   b. How essential is that discretion? Are venue questions such that a case-by-case determination would be preferred over a standard presumption or mandate?

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1.a. I don't think so. For one thing, courts are not supposed to review agency regulations "strictly," but to uphold them if they are not arbitrary or capricious or in violation of law. The various courts of appeals generally adhere to this standard, although occasionally a panel is either more or less aggressive than it is supposed to be. In any event, it is inappropriate to make venue rules depend on the short-term composition of particular courts.

1.b. As I discussed in my written statement, the disadvantages consist of the burdens to both plaintiffs and defendants, and the costs of attempting to figure out what the new statute means. I believe that these costs are significant. The benefits seem to me highly speculative and could be achieved by a more narrowly drawn, flexible provision.

2. I agree with the AEI editorial.

3.a. I don't believe so. The federal courts will make their decisions on the basis of what the federal law requires, not on the basis of regional wishes. My concerns about the bill rest more on the burdens imposed on plaintiffs and defendants, and on the courts in trying to construe the new provisions.

3.b. If there were regional differences, that would be a bad thing, at least under statutes that call for a uniform national standard. But even under current law, plaintiffs don't have to bring suit in the District, so conflicts among the courts are possible. I don't believe the likelihood of regional differences is so great as to count as a major argument against the bill.

4.a. I don't know that the bill is defendant-oriented, but it is a severe intrusion on the plaintiff's choice of forum. It tends to sacrifice the interests of plaintiffs in favor of the supposed interests of interveners--even though there may be no interveners.

4.b. That's hard to say. It might decrease litigation a bit because plaintiffs have limited funds, and would be forced to expend them on travel, but it's impossible to predict.

5.a. I think it's probably a bad idea. One wants to give discretion to district judges, who will be familiar with the particular facts.

5.b. I believe so. The terms of the bill so suggest.

5.c. The bill doesn't say, so I'm not sure.

6.a. As I said, I think that inflexibility is a vice here; one can't foresee all the situation that will arise, so I would leave more discretion to the district judges.

6.b. Yes. If current law is to be amended, it would probably be best to say that local control is a consideration, and to make it clear that the interests of interveners should be taken into account. But in this area at least, an across-the-board rule would probably produce considerable mischief.

STATEMENT OF PROFESSOR ERNEST GELLHORN*
ON S. 2419, A BILL TO AMEND THE PRIMARY
VENUE PROVISIONS OF TITLE 28, UNITED
STATES CODE

I.

I am appearing today as a teacher of administrative and antitrust law to discuss the possible effect of S. 2419 on judicial review of administrative action. Venue is a technical provision of law studied most carefully by scholars of civil procedure; it is used to allocate cases that are within the authority of the federal courts among the various districts in the country. Traditionally, venue rules have been written so as to assure that trials will be held or appeals will be heard where the convenience of the parties and witnesses is best served. As provided by statute, this has meant that the place of trial will be the district where the plaintiffs or defendants reside, where the cause of action arose, or where the real property (if any) is located. Special statutes also provide in limited circumstances for particular rules of venue, usually that venue is available exclusively or alternatively in the District of Columbia. In any case, current rules generally permit the plaintiff to choose where to bring the lawsuit, a power that is only narrowly limited by authority of a court, on motion of a party to transfer the case to another district "[f]or the convenience of the parties and witnesses, in the interests of justice."

S. 2419 would rewrite the rules of venue for challenges to government action when the subject of the lawsuit does not substaintially affect the residents of the district where the case is filed. In that circumstance, the case is to be transferred to the district where the lawsuit might have been brought and in which the suit would have the greatest impact--unless the interests of justice require that the original court retain the

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case. Admittedly concerned that challenges to environmental and other laws and regulations are being brought in the District of Columbia or other districts more favorable and convenient to the plaintiffs, the sponsors of this amendment seek to assure that lawsuits challenging agency action are limited to the locale most affected by the suit. They have taken a simple but radical approach that breaks sharply with tradition and with the long-followed rule that the law should look to the interests of the parties in the lawsuit in determining the most suitable forum. Instead, S. 2419, if enacted, would preclude plantiff's selection even though the site is agreeable to the plaintiff and the government; their choice would be overruled because of the interests of persons not parties to the original litigation--namely, the residents of affected communities.

II.

Nonetheless, there is considerable appeal to both the concerns underlying this bill and the argument that the interests of affected communites warrant holding the trial in their district unless overriden by other interests of justice. For example, traditional venue rules do not bar plaintiffs from selecting the most favorable forum and requests for transfer are not favored despite obvious forum-shopping. By substituting a neutral criterion--that is, where the lawsuit has a substantial local impact--S. 2419 seemingly serves a greater public interest. Particularly where a representative of local interests intervenes in the lawsuit to make a three-cornered controversy (between the plaintiff, the government, and the local interest) it seems fitting that those interests be considered in determining where the proceeding is to be held. In point of fact, since venue considerations are not jurisdictional and must be raised by the parties, unless representatives of local interests intervene it is unlikely that the proposed amendment to the venue provision would often change current results.* Thus, unless there are counterarguments

*One possible exception is where the government-defendant wants to transfer the suit to the local district, in which case S. 2419 probably would assure that the government's request was granted.

or other considerations that undercut this analysis, the mere fact that S. 2419 breaks with a long-standing tradition is immaterial, although it does suggest that Congress should proceed with caution before rewriting basic rules of venue.

III.

Despite the facial attractiveness of this proposed revision of the law of venue, there are several reasons why I conclude that S. 2419 should not be adopted as written.

First, to ignore the interests of the original parties regarding the place of the lawsuit in deference to the views of intervenors solely on the basis that at the time the suit was filed it appeared that the action would have a substantially greater impact in another district is to exalt an abstract community interest over the identified interests of the primary parties. If the thrust behind S. 2419 is not to appeal to local prejudice to misread the law or, conversely, if it is not based on a conclusion that distant courts are likely to misapply the facts--and neither assertion is warranted by the record or the apparent concern of the bill's sponsors--this proposal is a costly monument to our commitment that local interests be served by having trials close at hand. The difficulties with this argument are numerous and often obvious. It assumes, incorrectly, that trials of challenges to government action are generally closely followed by the media or the public. In point of fact, except for occasional spectaculars (usually murder trials), most court proceedings are dreary to the lay person and few trials receive close news coverage. Appeals to the circuit court, also affected by S. 2419, are likely to be even more distant in place and public attention. Where the local impact of the case is an issue, full presentation may justify a transfer, but courts are already empowered to authorize such moves. This is seldom a significant factor, however, at least as Congress has drafted most regulatory statutes.

Second, the interests of the parties, which S. 2419 would override, are real and substantial. The plaintiff and the govern-

ment generally agree that the District of Columbia is the appropriate site of the hearing when in fact it is convenient for them to litigate the case there. Both common sense and experience demonstrate that litigators with expertise in trying administrative law issues are frequently located in the nation's capital, and rewriting the venue laws is unlikely to change that distribution markedly. Forcing more cases outside the district will only serve to increase the cost of litigation to the government and the plaintiffs--and possibly to the local interests appearing as intervenors who are also frequently represented by national counsel. The records of the government are usually located in the nation's capital and the expense of trial or appeal elsewhere can be substantial. If anything, then, approval of S. 2419 will increase both the cost of litigation to the plaintiff and the burden on the government of defending its actions.

Third, to require that these trials and appeals be heard outside the District of Columbia, even when that is contrary to the parties' desires and it cannot be shown to be in the interests of justice, deprives the parties and the public of the experience of the District of Columbia courts in deciding numerous administrative cases. While expertise is not always an unmixed blessing, substantial advantages have accrued under existing provisions which allow the parties to agree on the selection of the District of Columbia circuit as the appropriate forum. As a reader of judicial opinions in this area, I am convinced that courts in the capital circuit have a better overall understanding of the technical substantive and procedural administrative law issues frequently at the core of these disputes. Recent appointments assure that this record of excellence will be maintained. The advantage of the current process is that it retains the check of a general court on specialized administrative agencies while also promoting the added insights and expertise otherwise generated only by specialization.

Fourth, S. 2419 is ambiguous, often impractical, and probably unlikely to achieve its goal. Its primary provision is that venue lies only in that judicial district where the residents would be "substantially affected by the agency action or failure to act." Recognizing the unspecific nature of these terms, the bill's sponsors have sought to explain that the residents of the district must have more than a modicum of interest in the outcome of the litigation, that the agency action must have a direct effect on district residents (excluding general nationwide effects on citizens, taxpayers, and consumers), and that these residents must be among the group most affected by the challenged ruling. Whether such attempts at filling in legislative gaps by creative legislative history should be honored is debatable; that it will lead to confusion and substantial litigation seems a certainty. In addition, these explanations hardly provide satisfactory answers. Where, for example, would one find the most substantial affect from regulatory standards governing automotive emissions--cities with high-smog content, states with auto plants, or districts dependent on import shipments? Would the "substantial impact" of the Food and Drug Administration's proposal to regulate saacharin be measured by the location of the headquarters of Coca Cola and Pepsi, the placement of their bottling plants, the situs of saacharin producers, communities with concentrations of diabetic patients, or something else? Or, to take an example offered in support of S. 2419 by one of the proponents, I wonder why a Federal Maritime Commission regulation adversely affecting the profitability of offshore fishing could not be challenged in a land-locked (Arizona) federal court. Would this conclusion still apply if it could be shown that the number of workers in seafood processing plants in Mesa, Flagstaff and Yuma exceeded the number of affected fisherman, even though located in a district served by a land-locked federal court in Phoenix? All this must, of course, be determined in advance of the trial on the merits, and raises legitimate concerns that a threshold trial on venue may now be required in advance of the

"real trial." Making trials and appeals more complex is not a recommended method of judicial reform. In this connection, the failure to define the "civil rights" actions which are to be unaffected by these amendments leaves disturbing questions unanswered. The sponsors would define such actions as suits brought against individuals pursuant to 42 U.S.C. § 1981 et seq. If this is a correct reading of the bill, however, then its impact on other civil rights actions should be noted. For example, it would modify current venue rules regarding challenges to rulings of the Equal Employment Opportunity Commission as well as to civil rights rulings of such agencies as the Departments of Education, Labor, or Health and Human Services. If the impact of these rulings is not nationwide, actions challenging them would have to be located in the district where the ruling would have the greatest impact. This is apparently an unintended consequence of the bill. On the other hand, all this may be a false alarm since S. 2419 as drafted may in fact reach relatively few actions. As noted earlier, venue limitations are normally enforced at the defendant's option; but the purpose sought by S. 2419 of venue in local districts is likely to be the aim of intervenors representing local interests. The difficulty left unresolved by S. 2419 is that existing case authority holds that intervenors are not empowered to object to venue. If this position is upheld, S. 2419 would seldom be invoked.

* * *

The core problem which this proposed change in the law of venue seeks to address, of course, is the undisciplined delegation of law-making power by Congress to the agencies. If Congress in fact were to make the basic normative judgments and gave the agencies more precise directions of the policies they wished implemented, controversies surrounding judicial interpretations of legislative charters would be less severe. The question of which court interpreted and applied the law would seldom be critical and the convenience of the parties would continue to

be the accepted norm. On the other hand, it is not likely that a mere change in the rules of venue can resolve the underlying concerns which justify this bill. By focusing on procedural solutions, not only are the problems not remedied but the incentive for Congress to undertake this more important task is diminished. Even worse, adoption of this proposal runs the risk of introducing an undesirable procedural rule that will impose unnecessary costs on litigants and will prove resistant to subsequent correction.

May 13, 1982

QUESTIONS SUBMITTED BY SENATOR LEAHY

1. a. Would the strict review of an agency regulation based on a certified record differ markedly depending on the court?

While there are, of course, differences among judges that would be reflected in the rulings of courts reviewing agency regulations under strict standards of review, such differences are likely to be more in tone and similar subtlety and thus could not be said to be "marked." Nonetheless, the parties often select review in a particular forum--especially the District of Columbia federal courts--because of the greater familiarity of the courts in that forum with the technical substantive law and experience in the processes of federal agencies.

b. What are the pros and cons of relocating such a review, especially in the case of nationwide standards?

As explained in my prior statement, the advantage of relocating review is an intangible, felt need for a judicial decision to be made in the district most affected by the decision. It is also possible that a greater understanding of the local impact may lead to a more rational analysis of the law and facts, although there is no empirical evidence to support such an inference. Similarly, the disadvantages are that the relocation would be against the express wishes of the plaintiff and possibly also of the defendant; it would deny the parties and the public of the experience of the selected court; and unless the amendments to the venue statutes are redrafted, their ambiguity and imprecision will lead to needless litigation and dispute.

2. How do you feel about the assertion in the AEI editorial that there are neither local judges, nor local issues and that to think otherwise is "False Federalism"?

Insofar as it was made in the context of discussing national legislation where local impact and local needs were not directed to be considered by a review court, the statement seems not only correct but also indisputable.

3. a. Is it fair to expect regionalized application of supposedly national law under S. 2419?

No, but it is fair to expect increasing conflicts among the circuits as cases would be dispersed and no longer concentrated in accordance with the convenience of the parties and the interests of justice. This assumes that S. 2419 will accomplish its stated goals of substantially affecting venue, a conclusion I doubt as elaborated upon in my testimony and statement.

b. What effect might that have on national regulatory programs?

Making the assumption required by the question--even though I answered with a qualified negative--the result would be to introduce needless confusion and conflict.

4. a. Could S. 2419 be characterized as making venue more defendant oriented? To what degree does S. 2419 alter the notion that the plaintiff's choice of forum should be perserved?

No. Without evidence as to who would make greatest use of the modifications in venue proposed by S. 2419, this conclusion is speculative. My guess, however, is that S. 2419 is aimed at serving intervenor interests, albeit ineffectively since it does not expressly alter the rule of TWA v CAB (2d. Cir. 1974) ("Venue is a privilege personal to a defendant in a civil suit and a person intervening on either side of the controversy may not object to improper venue.") Insofar as S. 2419 eliminates the convenience of the parties and adds a local impact requirement for venue, it has altered the general rule that plaintiff's choice of forum should generally be honored.

b. Currently, the law favors the plaintiff's choice of forum to facilitate access to the courts. What effect might this legislation have on the actual number of suits filed?

I have no basis on which to make an informed guess. In this regard, I would also note that the Department of Justice, as reflected in the testimony of the Assistant Attorney General for the Civil Division on May 13, 1982, finds itself similarly uninformed.

5. a. How do you feel about the apparent presumption of S. 2419 that transfer is mandatory upon motion of any party?

If correct, I would not favor it since it would apply a rigid, mechanical rule to the location of a lawsuit. Indeed, the supposed presumption is contradicted by the provision of § 1404(a) not modified by S. 2419, namely, the continued test of "the interests of justice." If the new presumption is mandatory, it seems illogical also to lodge discretion in the court. Yet I doubt whether the proponents of S. 2419 really want to eliminate such discretion.

b. Is there arguably such a presumption even present?

Arguable, yes; but as a reasonable interpretation of the bill, I wonder. Too heavy reliance is placed on the occasional substitution of "shall" for "may." It seems awkward drafting at best.

c. On what party would the burden of proof lie?

Usually the burden is on the proponent. Whether that would be appropriate under S. 2419 is less clear. It illustrates, however, another unfortunate result of the ambiguity in the current bill.

6. a. The "shall transfer" language appears in provisions governing both the federal circuit and district courts. How do you feel about reducing and almost eliminating court discretion in such matters?

I do not believe it would serve either the interests of justice or of the parties or intervenors. Venue, in contrast to jurisdiction, is a matter particularly related to questions of convenience of the parties, their counsel and witnesses--as well as of the courts. The more desirable, and I believe, appropriate remedy in this situation would be the addition of local impact as an added criterion for court consideration in the exercise of its informed discretion in deciding issues of venue on motion.

b. How essential is that discretion? Are venue questions such that a case-by-case determination would be preferred over a standard presumption or mandate?

As explained above, discretion seems desirable. I would not say essential, since the system could operate under a variety of rules--as illustrated by its survival under the rigid rule uniting venue to the District of Columbia for mandamus actions prior to 1962. The advantage of case-by-case determinations is that the likelihood of lengthy disputes about the meaning of local impact is lessened and the courts are positioned to respond to the needs of the parties and of justice. Rigid rules reaching undesirable results generally lead to formalisms in the law that are embarrassing and illogical. As long as powerful reasons can be given for retaining flexibility and as long as evidence of abuse by courts in deciding venue questions is wanting, there seems little justification for the narrow approach reflected in S. 2419. Its goal is not michevious but its results may be.

Senator DECONCINI. Mr. Yost, if you will start, and summarize please.

STATEMENTS OF NICHOLAS C. YOST, CENTER FOR LAW IN THE PUBLIC INTEREST, PATRICK PARENTEAU, NATIONAL WILDLIFE FEDERATION, AND ROBERT BLACHER, TERRIS & SUNDERLAND

Mr. YOST. Thank you, Mr. Chairman. I will do that. I am Nicholas C. Yost, and I appreciate your invitation to testify today, I am testifying on behalf of the Center for Law in the Public Interest, and the testimony is additionally supported by the Defenders of Wildlife, Environmental Defense Fund, and the Union of Concerned Scientists. I might just say by way of background, in showing somewhat of a States' rights proclivity, I spent 11 years in the California Justice Department under Governor Reagan and Governor Brown, and then served as general counsel to the Council on Environmental Quality under President Carter.

Let me start by quoting from the U.S. Supreme Court on what the present law is on the subject of venue. This is the *Gulf Oil* case.

> In some cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home.

That, to reiterate, is a statement of what the law now is. Local factors are now appropriate subjects for consideration in venue selection. What S. 2419 would do is not to introduce previously ignored local considerations, but rather to elevate local considerations to the exclusion of other criteria for venue selection. That, I submit, would be a mistake.

Before going into detail, I should note, however, that the bill has been improved considerably over the past 2 years, but, as will be evident from my testimony, I believe that it still has a long way to go and should not be enacted.

Venue and the related concepts of forum non conveniens and venue transfer have evolved through the common law, coming to consider a variety of factors that would recognize both the interests of the litigants and the requirements of a wise system of administration of justice. Those criteria have generally been said to include convenience of the parties, convenience of fact witnesses, availability of process to compel the presence of relevant witnesses, cost of obtaining the presence of witnesses, access to proof, calendar congestion, where the relevant events took place, and the interests of justice in general.

Those, then, are the facts which experience has taught us to be the relevant factors in deciding where to try lawsuits. The proposed venue switch would, with respect to suits against the Government, junk that experience in favor of one factor, that of local interest.

Let me be clear, I am not arguing in favor of Washington primacy; I don't believe that all or even most cases ought to be tried in Washington. What I do believe is that the process of venue selection should remain responsive to the variety of interests which time has shown to be relevant, and not just one of them.

What are the reasons that have been given for the legislation?

First, that most or a disproportionate amount of litigation against the United States is brought in the District of Columbia. In fact, of civil litigation in district courts to which the United States is a party, only 3 percent is brought in the District of Columbia. In brief, the Nation's Capital is the site of surprisingly little litigation against the Government.

Second, some of the proponents have argued that the courts in the Nation's Capital are overburdened and slow. In fact, the district court judges of the District of Columbia are less burdened than the national average. The Federal district court in the Nation's Capital moves faster than the national average.

Third, there are a certain number of horror stories that circulate to prove the need for a change in the law. I won't go into the detail of analyzing each of the cases, which are discussed in my attached article, but will note that once you subtract the cases where nobody moved to change venue out of Washington, you are left with three cases. Assistant Attorney General Dinkins in her testimony alluded to and mentioned a number of other cases. When you look at those cases closely, you will see that in fact the venue change was granted under existing law or that the case hasn't been decided yet, and you are left with one case in which there were nine counts, seven of which were transferred, and two of which were retained.

So I end up with a total of three and two-ninths cases which the proponents of venue switch argue support the case for a massive change in the Nation's venue laws.

I think that Senator Leahy's questioning of Assistant Attorney General Dinkins further illuminated the lack of factual basis for the massive changes that are being advocated.

When the U.S. Department of Justice last testified on the subject of venue, in the excellent series of hearings over which you presided in 1980, the Department concluded that the present venue statute "is working in an adequate and just manner." continuing to quote: "There are not an inordinate number of cases tried in the District of Columbia and the Department of Justice makes an effort to transfer cases to a local forum when the issues are ones which could be better handled there."

Subsequent evidence has not contradicted this evaluation. In fact, Senator Leahy's questioning this afternoon of Assistant Attorney General Dinkins revealed that the Department of Justice has not bothered to make a numerical survey of the cases before taking a different position.

Fourth, some proponents of the venue switch legislation, particularly James Watt in his testimony at the hearings 2 years ago, seemed to confuse the rhetoric of the sagebrush rebellion with the merits of the proposal. One need not disavow sympathy with many Americans' feelings of not being listened to and considered by Government to restate the obvious: we are not talking about local laws and local judges; we are talking about Federal laws and Federal judges, and the need for citizens in different districts and different circuits to be treated equally and under laws which are applied in the same manner. Sometimes the answer is given that that is what the Supreme Court is for, that different courts, by evaluating from different perspectives important questions of law, illuminate the

matters for Supreme Court decision, and the Supreme Court can then, with the advantage of other courts looking at the issues, consider them in a wiser manner. But in fact the last study done of Supreme Court review of cases where there are conflicts between the circuits showed that the Supreme Court's caseload is such that it simply cannot do that. There are substantial numbers of cases with direct conflicts between the circuits where the Supreme Court can't get in.

Moreover, Washington is the Capital of this Nation. Whether or not some of the sagebrush rebels like it, Washington is, in the words of our Constitution, "the Seat of the Government of the United States." Congress, the Supreme Court, the President and most of the ranking members of the executive branch are here, the people making the major decisions are here, the private sector is here in terms of the industry-trade groups, the national labor organizations, public interest communities, and all their lawyers. All these are present in Washington. As a result, when one of these private groups sues the United States or its officials, it is often not illogical for such a suit to be permitted in the Nation's Capital. Again, I am not saying that they should be brought here; I am saying that in some cases Washington is an appropriate site of venue.

Fifth, the premise of the venue switch bill, that one may without too much danger of encouraging extra litigation on the subject of venue itself, distinguish that which is local from that which is national, is simply wrong. In the following examples, please try to figure out who is "substantially affected" or, worse yet, who is subject to a "substantially greater impact." I might note parenthetically that the administration seems to join me in opposition to the use of this term.

If the Forest Service, for instance, adopts or fails to adopt rules concerning the national forest lands at Lake Tahoe, is there a substantially greater impact on those few who inhabit the basin and the eastern district of California or the district of Nevada year around, or on the many who come to the basin from the northern district of California for recreation? To borrow an example from the excellent editorial against the venue switch proposal in Regulation, a publication of the American Enterprise Institute, assume a lawsuit to set aside as too stringent an EPA standard on auto emissions. Which districts are substantially affected and which are subject to substantially greater impact, those with manufacturing plants, those with auto dealerships, those in which polluting autos will be driven? I don't know the answers; I suspect that nobody else does either.

[Senator Simpson resumes the Chair.]

Indeed, one can argue that when a rule affects individuals equally, when substantially greater impact language is in the statute, all cases should be transferred to that district with the greatest population.

The principal operative words of this bill are ambiguous in the extreme. Their presence will not only invite but will demand threshold litigation. Phrases which occupy less pivotal roles are equally ambiguous. The phrase "local environmental nature" and

"any other Act of Congress relating to environmental quality" will invite further dispute.

Sixth, the venue switch proposal may increase the number of cases in absolute terms.

Seventh, there can be situation in which a plaintiff may be whipsawed out of court completely. In both of these areas I have cited examples in the article attached to my statement.

Eighth, I will note but not address one other problem which is being analyzed by others. Proposed section 2112(b)(4) repeals by implication numerous statutes where Congress has previously enacted separate venue provisions. Of course, by not amending those statutes, it will serve to mislead counsel who may be expected to rely on sections found in relevant portions of the United States Code.

I note that Assistant Attorney General Dinkins joins in bewilderment with this section, too.

Ninth, a principal effect of this bill will be to raise costs for public interest groups. Such groups, whatever their specific goals, typically are short of money. Those interested in national affairs try to raise funds to maintain a Washington office, to oversee and influence the activities of Congress and the executive branch in the areas in which they are interested. That is our system working at best. But those same organizations which may be able to afford a Washington office and to afford to litigate in Washington may not be able to afford to litigate throughout the country.

And, finally, let me turn to a question that must underlie this entire venue switch proposal. What does it do? Does anybody know what it does? Two years ago when hearings were held on similar bills, nobody seemed to know what they would do. I haven't seen any evidence that anybody, including those who would persuade Congress to adopt such legislation, has found out in the interim. As Senator Leahy's questioning of Assistant Attorney General Dinkins showed this afternoon, the Department of Justice has not conducted any numerical studies of the consequences in this time. The proposal is presumably aimed at a small fraction of the 1 percent of the cases that are environmental. Indeed, the proposal may be aimed at as few as three or four cases. Unfortunately, it also covers the other 99 percent of the civil litigation against the Government. Two years ago the Administrative Office of the Courts stated "there is no way to determine what effect a broad amendment to the general venue statutes * * * would have upon caseloads and litigation processes." James Watt, then testifying on venue shift proposals applicable to all civil suits against the Government, said "Frankly, I have not thought through all the potential situations which might be affected by the all-inclusive nature of this bill." It is now 2 years later, and, I submit, most respectfully, that nobody seems to have thought through the implications for all those other 99 percent of the cases, certainly not the Justice Department, as testified this afternoon.

Let me conclude. The development of venue legislation has been a history of opening doors to give citizens their day in court. The proposed legislation would close them. Present law recognizes a variety of factors relevant to where a case is tried—local interest, the parties' convenience, national interest, sound administration of justice. All are factors relevant to the selection of a forum. The pro-

posed legislation would end this flexibility and substitute a rigid rule designed to make one factor, local interest, the only factor in venue selection. To those sensitive to the variety of factors traditionally relevant to the selection of a forum, the proposal offends against good sense.

Thank you, Senator Simpson and Senator Mathias.

Senator SIMPSON. Thank you, Mr. Yost, very much. Please proceed.

Mr. BLACHER. Thank you, Senator. My name is Robert Blacher. I am an attorney with the law firm of Terris & Sunderland, which is located in Washington, D.C. For purposes of convenience, I will identify our firm as a public interest law firm, although that is a term, when you are here the same day as Dan Burt from the Capitol Legal Foundation, testifying about a bill that was, I think, generated by the Mountain States Legal Foundation, that might not have as much point as it would otherwise. What it means in our case is that we do do environmental and civil rights litigation, environmental litigation on behalf of public interest groups, such as the Natural Resources Defense Council and the Sierra Club. We also, however, do a good deal of environmental litigation on behalf of local citizens groups dealing with projects that affect a single community.

I would like to address first the issue of why in fact the sponsors of this legislation, including yourself, Senator Simpson, have been unable, I am sure after careful search, to find very many instances of abuse of the current venue laws. As a litigator who has to make the decision as to where an action will be brought on behalf of environmental groups and on behalf of individual citizen plaintiffs, I think I can explain why there is no record of abuse.

The fact of the matter, Senator, is that existing law sufficiently discourages forum shopping. It would be a waste of our time and therefore a waste of our clients' money to bring cases in the District of Columbia courts which have a localized impact other than in the District of Columbia. I am not saying we have never done so; there are unique examples where we have tried to do so. But the record would show that we have failed in the vast majority of instances to keep a case here in such a circumstance, and have only been able to do so when there truly was a compelling reason to bring the case here in the District of Columbia, even though the impact was elsewhere.

Now, I am talking about district court actions largely under such statutes as the National Environmental Policy Act or under the National Historic Preservation Act. I am not talking about appeals of nationwide regulations. Those cases do come here—in many instances they can only come here—and I will return to that in a moment.

But for our clients' interests, when we are attacking a particular project—a highway, a dam, cutting down a forest, or offshore oil leasing—yes, under current law, venue very often will properly lie in the District of Columbia. But we know we will get into a fight over venue if we file in the District of Columbia; we know that that will be expensive for our clients; and we know that the likelihood is that we will lose. And therefore we do not file those cases in the District of Columbia. I can give you case after case where we have

brought them in California, in Florida, in Iowa, where the project lies.

The second point I would like to address briefly is the issue of availability of witnesses, which is the main issue that I have addressed in my written statement. The fact of the matter is that decisionmaking is increasingly centralized in Washington. Now, for philosophical reasons, you may have objections to that. But that is a function of the authorizing statutes, and often the decisions are made here. If we are challenging such a decision, there will be cases where to properly challenge it we need to call to the stand the Government official who made the decision, and that Government official lives and resides in the District of Columbia more often than not, and is beyond the subpena power of courts outside of the District of Columbia. If we go to Iowa to challenge a project and the decision was made by a Department of Interior official here, and we want to deal with whether that official was subject to political influence, to get that witness out to Iowa is beyond the authority of the Iowa court; it cannot be done. It forces us, therefore, to take the deposition of that witness here, to introduce the deposition at trial. For a trial judge to be faced with the sterile transcript of a deposition is a very different story than seeing the live witness and hearing his testimony.

Furthermore, the results can be terribly unfair in particular instances, because the Government can voluntarily produce those witnesses that it wishes to produce, and what the Government will do is bring the witnesses there that favor its case, but, being as we can't subpoena them, fail to bring the witnesses that favor our case.

Now, there is a solution to this, Senator. You can amend 1391(e) in the way you propose to do, and authorize the same nationwide service of subpenas as is currently authorized for nationwide service of summonses and complaints under 1391(e). I would suggest to you that if you consider that as the solution, please also consider that when we subpena a witness we have to pay that witness's travel cost, and when we are doing that on behalf of a small environmental citizens group, that can be a very substantial cost. It would strike me that if a Government official is a necessary witness, then the Government should also bear the cost of transporting that witness out to California, out to Iowa, wherever the case is brought, if you determine to enact this legislation, which, of course, I hope you do not.

The third issue that I would like to address is the issue of exclusive venue which this bill would overrule.

I'm sorry, Senator, I will keep it brief.

Senator SIMPSON. Thank you.

Mr. BLACHER. What has been addressed the least here today is a one-paragraph part of this bill on page 4 which says:

> Notwithstanding any provision of law, petitions for review of agency action may be filed in the judicial circuit in which the person seeking review resides or has his principal place of business.

Senator Simpson, I have seen you day after day struggling with the Clean Air Act on the Senate Environment Committee; I think you will understand that section 307 of the Clean Air Act currently

authorizes review of nationwide air quality regulations only in the District of Columbia circuit. This bill overrules 307 in the Clean Air Act.

For example, EPA recently promulgated the stack-height regulations. They were appealed to the District of Columbia circuit which was the only court that had venue over that appeal. Under this bill it would be appealed to all 12 circuits by various industry petitioners. There would then be a flip of the coin by the Administrative Office of the Courts to determine which circuit would decide venue, at which point that court would have to determine where the impact of the regulation was "substantially greater" and perhaps have to transfer again.

What is now a simple process of going to the one court that has venue and the court that for a number of reasons I will not take the time to go into, is indeed the most appropriate court to decide issues about nationwide regulations, under S. 2419 you would set up a time-consuming costly venue fight for every one of those appeals.

And, Senator, ultimately the Government picks up the tab for that fight. Not only does Carol Dinkins have to send out her lawyers all over the country, under various attorneys fees statutes, both industry participants and environmental participants have the right to seek fees, and that includes travel costs and the time spent briefing and arguing the issue of venue.

Senator SIMPSON. Thank you very much. I appreciate having your views.

And now Mr. Parenteau.

Mr. PARENTEAU. Thank you, Mr. Chairman. My name is Patrick Parenteau, I am Vice President of Resources Conservation with the National Wildlife Federation. The Federation appreciates very much the opportunity to be here today.

At the outset, I would like to say that although ultimately the Federation finds itself in opposition to S. 2419, I think, Senator Simpson, that you and Senator DeConcini have raised some fair questions about how venue is determined. I don't think the answer you have come up with is the right answer, and I will get into that in more detail in a moment.

I would, though, like to step back from some of the scholarly treatment of this subject that we have heard today and have seen in some of the publications that have come out, including the one by the National Legal Center for the Public Interest titled "Venue at the Crossroads," which I think is an extremely lucid analysis of this issue. And you and Senator DeConcini are to be commended for having precipitated much of the work that is now reflected in this publication.

I don't purport to be a scholar. I must say, though, in passing that rarely have I seen the legal academic community so united in an opinion about a subject like the functional purpose of a venue provision, and that opinion seems to be uniformly negative toward the idea of venue switching based on the principles outlined in S. 2419.

I would like to come at it from the standpoint of a representative of a large citizens conservation organization and a practicing envi-

ronmental lawyer who has tried cases all over the country, and who has been involved in more than one venue fight.

It seems to me that the crux of the matter is how to accommodate what have variously been called "local interests" or "affected residents" of various districts throughout the country. And I think there may be an assumption here that is not borne out in reality, and that is that cases brought by organizations like the National Wildlife Federation represent national interests on one side, whereas there are "local interests" on another side. The fact of the matter is that the National Wildlife Federation is comprised of 4 million individual Americans all across the country, affiliate organizations in all the 50 States, and a great number of "local interests," and so when we bring a lawsuit in the District of Columbia we are definitely bringing it on behalf of local interests.

To give an example of that, the Government has cited in its testimony today a case that we recently filed in the District of Columbia involving the Powder River Basin coal lease sale, which is held up as yet another example of an abuse of the venue provision. Well, the facts of the matter are that, No. 1 a prior case was filed in the District of Columbia by the Northern Cheyenne Tribe, so we really had little choice but to follow that case here as a related case. But, more importantly, our case was filed on behalf of the Northern Plains Resource Council located in Montana, which is a ranching group concerned about coal leasing in an area that has not been opened to coal and the impacts on their agricultural economy. And I submit that that is a local interest which chose to litigate their case in the District of Columbia both because there was a prior case here and because the decision was made here, and as recent events have shown, there is a great deal that was done at the Washington, D.C., level with respect to that lease sale which goes to the question of whether fair market return was gained by the Government. And all the witnesses related to that issue, which is the central issue in our case, are here.

Beyond the assumption that because it is a national group litigating it can't involve local interests, which I have said is false, there is another assumption here that there is a great deal of bias on the part of the D.C. courts in favor of environmental groups. Well, I can tell you that we have lost cases here that we thought we should have won, and we have won cases in Louisiana that we thought we were going to lose. And I think that this business of bias is greatly overstated and ought not to be in any way an assumption on the basis of which legislation should be enacted.

And the final assumption that I think should be revealed here is the notion that you can legislate the odd case. We have had 20 years of experience under the existing venue provision and yet only three or four examples have been cited as the abuses of that system. And I suggest that if the Congress attempts to legislate the odd case, it will create more problems than it solves.

All of the arguments that have been laid out so carefully by Nick Yost and others I think make a very compelling case that there simply is no basis upon which to presume that the courts in D.C. or anywhere else are abusing the discretion that they presently have under existing law to transfer cases when the interests of justice so require.

And I guess our bottom line is that we just simply object to the idea that as a matter of law all those other factors that the courts are presently considering should be placed in a secondary status to something as ill defined and subjective as "local interests." And so, although we don't oppose every aspect of S. 2419—for example, we do believe that the notice provisions, with some modification, are fair requirements, that is, notice to State attorneys general when cases are filed in the District of Columbia—we also think that random selection to deal with the problem of race to the courthouse is a good idea, and we think that explicitly providing for intervenors to file venue transfer motions is also a good idea—but we think with that package of reforms the "abuses" that have been cited are more than adequately taken care of and to go beyond that is simply to open a can of worms that we all are going to be sorry for.

And so I would urge very strongly that this Committee and that the Senate not disrupt the neutral process which is presently existing in our venue provision and mandate that conservation organizations like the National Wildlife Federation, representing citizens all across the country, be foreclosed from litigating in the District of Columbia.

Thank you, Mr. Chairman.

Senator SIMPSON. Thank you very much. The three of you bring a good perspective to your position.

Do you have a comment or question, Senator Mathias?

Senator MATHIAS. Mr. Chairman, you referred to the fact that pressures build up and have been all day, and there is at this very moment pending a meeting on which the safety and security of the town of Rock Springs, Wyo., depends.

Senator SIMPSON. Good Lord!

Senator MATHIAS. The State Department is reaching its tentacles out because that is the site of a consulate of the Republic of France.

Senator SIMPSON. A French consulate in Rock Springs, that's great.

Senator MATHIAS. And I must attend a meeting to protect Rock Springs from the tentacles of the State Department in this case.

Senator SIMPSON. Go forth.

Senator MATHIAS. But I did want to just say to this panel that I think they have presented very important statements here today. It is consistent with the views that have been expressed on this subject by the attorney general of Maryland, Steven Sacks, who takes a very thoughtful approach and a very similar approach to that taken by Mr. Yost and his colleagues. And I find myself in large agreement with what has been said.

So thank you very much for all of your help here today.

Senator SIMPSON. Thank you, Senator Mathias, it is always good to work with you. I enjoy it thoroughly.

Let me ask a few questions here. I am interested in what you are saying, that there are things in here that are worthwhile, I believe that is the general consensus, that we have raised some good questions in presenting the legislation, and that there are things of merit that we should pursue. Is that a general view? I am not

trying to identify those or lead you into a snare and pull it; I am just saying there are some good things here.

Mr. YOST. Senator, I personally agree with what you are saying, but I also think it fair to say that the good things are, on the whole, tangential to the main direction of the bill, and that the principal thrust of the bill, of making local factors the overriding factor in venue selection, is one which a certain massaging cannot remedy.

Senator SIMPSON. I was interested in Mr. Blacher's comments—it is true how we have grappled with regard to the Clean Air Act, and the vexatious parts of it that we deal with. Whether we will get anything done in that area, I don't know. It would be unfortunate if we just didn't do anything, and let the old belchers belch, and new sources would not come onstream under any circumstances. I don't think anybody has that in mind. But there is a difference there between the Clean Air Act and what this bill addresses, and it is that the Clean Air Act indeed sets out very clearly where we are with regard to jurisdiction and venue and that type of thing.

Mr. BLACHER. Senator, if I may, the point I was trying to make was that indeed this bill overruled section 307.

Senator SIMPSON. If you read it that way—we had some colloquy on that earlier before I left.

Mr. BLACHER. Senator, the statement by Senator DeConcini that he submitted for the record analyzing this amendment—at the time it was amendment to the regulatory reform bill—dropped a footnote that identified some of the statutes that are overruled;[1] 307 of the Clean Air Act is only one of the statutes that are in fact overruled. I have been told that there are as many as 20, but that is by a cursory review.

In truth and in fact, it seems to me that before this committee adopts a provision that begins with "Notwithstanding any other provision of law * * *" it would indeed be useful if we all knew what those provisions of law were.

I can tell you, Senator, that it does overrule 307 of the Clean Air Act; it does overrule the venue provision in the Resource Conservation and Recovery Act; it does overrule the venue provision in the Safe Water Drinking Act. There are certainly others that it overrules as well, and it seems to me that that decision ought to be made by the authorizing committee that initially decided that it was appropriate to vest venue solely in the District of Columbia circuit.

Senator SIMPSON. Well, I hear what you are saying, but, I don't think we are talking about overruling, we are talking about adding another forum. There's a difference there.

Let me finish—I get to ask the questions for a minute now.

It is interesting to hear one of you testify there has never been so united a front in the legal academic community as is the one oppossed to the idea of venue switching based on principles outlined in S. 2419. There was one other issue that I remember that caused such great excitement in the areas of the District of Columbia and the administrative tribunals. That was the Bumpers

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[1] See daily Congressional Record, Feb. 10, 1982, pp. S. 759 and S. 761 note 9.

amendment—more fun there almost than here. And yet that received a rather interesting response from the U.S. Congress—amended rather heartily for a couple of years, but still the essence is there, and is in the legislation that Senator Leahy and Senator Laxalt have very adeptly gotten through the Senate.

What I want to share with you—and then you can fire away—is that there are indeed more than just, one or two things or one or two cases that have popped up in this area. We talk about the national interest, cases of nationwide significance—those are key words throughout the debate, that there is certain expertise here within this district that is unknown to the "unwashed"—other Federal courts—in the rest of the land. And I think of cases like the *Sierra Club* v. *Interstate Commerce Commission,* which had to do with the construction of a rail line in the Powder River basin, Wyoming, hardly I think a case of national significance. The *Sierra Club* v. *Morton,* which was the Northern Great Plains case with regard to environmental impact statements. I served in the Wyoming legislature and we put on the books a mine land reclamation law which was tougher than any in the United States, land use planning at the local level—try that one when you are out in public life, an air quality act which is stronger than the Federal, water quality acts that are stronger than the Federal—and we got more protections on top of those acts, as if we were a bunch of boobs running around—and it's oddly done by a strange group called a legislature, consisting of Democrats and Republicans, a strange bunch.

So that was an interesting case for us to observe. And then the *North Slope Borough* v. *Andrus* which had to do with the lease of properties on the north coast of Alaska, and it would be difficult to see how that became a national cause celebre; *Society for Animal Rights* v. *Schlesinger* which had to do with the destruction of blackbirds on two military bases in Kentucky and Tennessee; *Washington Environmental Council* v. *The Federal Energy Regulatory Commission* with regard to raising the height of Ross Dam on the Skagit River—difficult to see the nationwide interest that had to do with that.

Those are some specifics. I guess you can see—and not wanting to be sarcastic, it's not helpful, it's not an effective way of dealing—but you can see, I think, the feeling of people who have to deal with that. We in Wyoming, those in Arizona, those in Nevada, the public land States, have to deal with a mentality—that somehow we in Wyoming strip mine the north face of the Grand Teton. We don't and I wouldn't have any part of it. I read that continually, that we would drill for oil and gas in Yellowstone National Park and Grand Teton. That's phony. I wouldn't be any part of that, who would?

Where we happen to get our coal in the Fort Union coal deposit is a bunch of rolling hills covered with cheap grass. We don't get it off of the Grand Teton. So it offends when we have to deal with people who have never been there and don't know a thing about it, and it is frustrating. I am not one who is leading the charge on this aspect or that, but you make an interesting statement that what could be more ill-defined and subjective as a local interest. How fascinating. There is really a kind of arrogance in that statement.

95-700 O—82——7

Now, what particularly amused me this morning was to read in the paper that Congress is considering a bill to shift a suit's venue to the area affected. And here is a statement by an officer of the National Wildlife Federation, a very respected group I have worked with for many years, who says "All the experts are here, this is where national policy is set, there is no reason to move." And then goes on to say another member of another group, saying "Federal judges, no matter where they sit, should interpret the law based upon the legal merits of the case not on a geographic basis, so that there is no sound legal reason to move cases."

And I submit that that is exactly what we are up to. There are Federal judges, other than the District of Columbia, who know just exactly what the law is, and some of them out there in the hinterlands, in the wilderness, have gone to school at Stanford, Harvard, Yale, Laramie, South Bend, Salt Lake, and they really do know what the score is. They are not boobs.

So that I guess is something I wanted to share with you. I see an arrogance attached to it, which is unbecoming to me, that this is where it is, this great village with its jurisdictional system and its excellent judiciary—and it is, and I have addressed the District of Columbia bar and the circuit court, and had a delightful time—many of them are my friends over all the political spectrum and all the philosophical spectrum. But there is an arrogance involved in this type of thing which is not going to be helpful. In fact, it will be more helpful to us than it will to you, as you do what you do with regard to bringing these suits that deeply affect local citizens in Chugwater, Wyo., in Gopher Gap, Ariz.—there are places like these populated by articulate, thoughtful, highly opinionated human beings, and I think that is forgotten in this process.

That's all I wanted to share with you.

Now, you did have a response, and you may fire away.

Mr. PARENTEAU. May I, please, since the Wildlife Federation got the brunt there?

Senator SIMPSON. Yes.

Mr. PARENTEAU. Senator, there is absolutely no intent to be arrogant about this issue whatsoever on our part, and in fact, having grown up in various parts of the West, including Nebraska and Wyoming, I share much of the same sentiment that you do about the so-called elitists of the East.

I think the commentary in our testimony and the reference in the newspaper article was really—went really more to the point I tried to make earlier, and that is that there is a tendency in discussing this legislation to assume that because it is the National Wildlife Federation filing a suit in Washington, D.C., there are no local interests represented in that case, and my point is that the National Wildlife Federation doesn't bring lawsuits in the abstract; the law doesn't allow it, and we couldn't afford to do it anyway. We bring lawsuits on the basis of local interests. In the case of the Powder River coal lease sale which I mentioned, we are bringing it on behalf of ranchers in Wyoming and Montana, and we are bringing it here, and we think it's important that we have this forum to bring it to when it's appropriate.

And having said that, I took a look at our docket before I came in here, and of the 50 cases we presently have in various stages of

litigation, the great bulk of that is not in the District of Columbia, it's all over the country. So we don't use this as a preferred forum for every case. Nevertheless, it is critically important that we have it as an option for nationally significant cases when—and when I referred to experts, or when the press account referred to experts, we were talking about experts within the Government that are needed to come and give testimony, not that the courts of D.C. were more expert than the courts of Wyoming or indeed that the parties involved in a Washington, D.C., case are more expert than anybody else anywhere in the world.

These are very practical considerations which have somehow become an ideological battleground. The practical problems facing groups like the National Wildlife Federation and others is that we don't have an unlimited budget for bringing litigation, we use litigation as the last resort, we would much prefer to mediate and negotiate solutions because they are much less expensive. The fact is that we have to go to court sometimes, and sometimes we have to go to court in Washington, D.C., and sometimes it makes a lot of sense.

Let me take one of the cases that you cited as an example of a case that had local interest that didn't belong here, and that is the *North Slope Borough* case, which I litigated along with other attorneys. It's interesting to note that of all the parties involved in that case—it included two of the local native villages that subsist on the Bowhead Whale, in addition to the National Wildlife Federation, the State of Alaska, which chose to participate as an amicus even though the judge invited them to participate as an intervenor, and indeed invited them to submit a motion to transfer venue—the Government and all of the oil companies involved in the lease sale, no one wanted a change of venue; everyone in that case wanted the case tried here because it made the most sense to do so.

Now, I will note that regardless of how one might view the merits of the plaintiff's case in that instance, that entire case was tried, appealed, and decided within 8 months—and that is a record that no other circuit could match. And one of the primary reasons was because so many of the key records and witnesses and so forth, attorneys familiar with the case, were right here, and we were all able to expedite that entire case. And I think justice was served in that instance.

Under the proposed bill, however, Judge Robinson in that case would have been constrained to transfer that case to Alaska and cart all of those witnesses, all of those records, and all of those attorneys to Alaska, when nobody wanted it done. And that is a prime example of why this bill goes too far, although there are some good things in it.

Senator SIMPSON. You get your turn.

Mr. YOST. If I could very briefly come in, I am one of those boobs, too, and I used to work for the State of California for 11 years, and was often resentful of Federal preemption and things of that sort, and handled a number of cases along those lines.

I don't think any of us are arguing for some sort of view that people in Washington can handle things better, that national interest matters are more deserving of being handled in one part of the Nation than in another part of the Nation. What we are arguing

for is really flexibility, that through the course of time we have evolved, first in the common law and now in statutes, a whole bunch of things that go into deciding where to try cases. That involves convenience of parties, it involves convenience of witnesses, it involves sound administration of justice, it involves local interest, it involves all of those things, and that the system is properly responsive to all of those. This bill, we feel, would substitute one of those many factors and make it the overriding factor, that of local interest. And it is that which we regard as a mistake and unbalanced.

Senator SIMPSON. I understand.

Mr. BLACHER. Senator?

Senator SIMPSON. Yes.

Mr. BLACHER. I am reluctant to add very much to that, because I am from New England and I sort of feel out of it here. I would simply add that——

Senator SIMPSON. But if you have been to Jackson Hole, you automatically qualify as an expert on northwest Wyoming.

Mr. BLACHER. Well, no, Senator, I have been to Jackson Hole, but I would not qualify myself as an expert on Wyoming.

Senator SIMPSON. Go ahead, please.

Mr. BLACHER. Nor would any court accept those qualifications.

Senator SIMPSON. Many do.

Mr. BLACHER. I would simply like to point out again that I am sympathetic to most of the things that you said and the concerns that you have, but the point of the statement I was making earlier, Senator, was that in fact the existing system is also sympathetic to those concerns, indeed so sympathetic that any attempt at forum shopping, any attempt to bring a case that really only affects Wyoming here in the District of Columbia is more often than not met by a very hostile district judge here who says: Mr. Terris, Mr. Blacher, or whoever else the environmental litigants are represented by, what are you doing in my court, you are here with injunction papers, you are here with TRO papers—this is one of those blasted cases where it is going to take an enormous amount of time, there is a 500-page environmental impact statement, and it affects the district judge out in Wyoming—get out there.

So I am telling you, Senator, that there is not a record of abuse that is substantial enough to take away from us the power when necessary to invoke the aid of U.S. courts that are located here in the District of Columbia.

Senator SIMPSON. I understand your position. And I guess the issue is one of what is nationwide interest, but how we ever define that, unless we pursue that in the courts of the land—perhaps that's where it is, you know, what is one man's definition of a case of nationwide interest is certainly not going to be another's.

But I do remember enough about the practice of law in my other life, that my clients always wanted me to bring lawsuits because they thought they would win. I mean, I don't know any other reason for bringing a lawsuit.

So if we leave out all the esoterica and other stuff, you bring lawsuits so you can win, an adversarial system. I think that's always good to keep that in mind—and you like to go where you have won before. So that is what I would do, too, in the law business—and

made a good livelihood doing it. But let's not, you know, believe that that isn't the case. That's what you do, you go where you win. And you win, you've got a pretty good batting average in the District of Columbia, why not bring anything there whether it has a national interest or not, if you have got a good batting average. And that's what we are talking about, that's—some of the language here in the rotation of things, maybe we can probe that, look into that, because otherwise we get locked in with a system where we just, you know—I remember the old colloquialism where a guy moved from one area of Wyoming to another, and he was an old-time lawyer, and he said old so-and-so left town and took all his witnesses with him to a new location. Think about that one as night falls.

Anyway, I do appreciate what you are saying and we will proceed with this and, when the hearing record is prepared, see if we can't craft something that is appropriate to get at some of the things that we address here.

Thank you very much.

Let's have about a 3-minute recess.

[Brief recess.]

[Prepared statements follow:]

Statement of

NICHOLAS C. YOST[1]

Center for Law in the Public Interest

PROPOSED AMENDMENTS TO THE FEDERAL VENUE STATUTES

Mr. Chairman and Members of the Committee, I am Nicholas C. Yost, and I appreciate your invitation to testify today on the important subject of proposals to change the Federal venue statutes with respect to suits against the United States and its officers.[2] By way of background I served in the California Department of Justice for eleven years. During that time I was Counsel to the State Environmental Quality Study Council under Governor Reagan and was Deputy Attorney General in Charge of the Environmental Unit under Attorney General Evelle Younger during both the Reagan and Brown governorships. I then served as General Counsel of the Council on Environmental Quality under President Carter and for the first several months of the Reagan Administration. After a year as a Visiting Scholar at the Environmental Law Institute I am now engaged in setting up the Washington office of the Center for Law in the Public Interest, which for many years has been the West Coast's foremost public interest law firm.

Let me begin by quoting the United States Supreme Court on what present law is on the subject of venue:

> "In some cases which touch the affairs of many persons, there is reason for holding the trial

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[1] Defenders of Wildlife, Environmental Defense Fund, and the General Counsel of the Union of Concerned Scientists join in support of this testimony.

[2] I have appended two articles I have written on this subject to which I would invite your attention for further detail concerning the points I make. The first, entitled Venue Periled, is a brief article from the February 12, 1982, New York Times. The second, Present Venue Provisions -- Flexibility v. Inconvenience, is from a booklet presenting both sides of the subject sponsored by the National Legal Center for the Public Interest entitled Venue At the Crossroads (cited by Sen. DeConcini in introducing S. 2419 [Cong. Rec., daily ed., April 21, 1982, at S. 3970]).

> in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947); see Present Venue Provisions, attached, at pp. 37, 56.

That, to reiterate, is a statement of present law. Local factors are now appropriate subjects for consideration in venue selection. What the proposal before you would do is not to introduce previously ignored local considerations, but rather to elevate local considerations to the exclusion of other criteria for venue selection. That would be a mistake.

Before going into detail, however, I should note that this bill has been improved considerably over the past two years, but, as will be evident from my testimony, I believe it still has a long way to go and should not be enacted.

Venue and the related concepts of forum non conveniens and venue transfer have evolved through the common law, coming to consider a variety of factors that would recognize both the interests of the litigants and the requirements of a wise system of administration of justice. These criteria have been well summarized as follows:

(1) Convenience of the parties.

(2) Convenience of fact witnesses.

(3) Availability of process to compel the presence of relevant witnesses.

(4) Cost of obtaining the presence of witnesses.

(5) Access to proof.

(6) Calendar congestion.

(7) Where the relevant events took place.

(8) The interests of justice in general. (See Present Venue Provisions, attached at 41; also see pp. 37-38.)

These are the factors which experience has taught us to be the relevant factors in deciding where to try lawsuits. The

proposed venue switch would, with respect to suits against the government, junk that experience in favor of one factor, that of local interest.

Let me be clear. I do not argue in favor of Washington primacy. I do not believe all or even most cases should be tried in Washington. What I do believe is that the process of venue selection should remain responsive to all the factors shown to have been relevant - not to just one of them.

What are the reasons that have been given for venue switch legislation?

First, the proponents (or some of them) have argued that "most" litigation against the United States is tried in the District of Columbia. (Present Venue Provisions, attached, at 47.) In fact, of civil litigation in District Courts to which the United States is a party only 3% is brought in the District of Columbia. (Present Venue Provisions, attached, at 48. Throughout this testimony I have used figures from the year ended June 30, 1980, the figures which I researched for the article on Present Venue Provisions. The 1981 figures which I have seen are not out of line with previous years' figures.) Further, of environmental litigation to which the United States is a party about 7% is brought in the District of Columbia. (Present Venue Provisions, at 48-49.) In brief, the Nation's capital is the site of surprisingly little litigation against the government.

Second, some of the proponents have argued that the Courts in the Nation's capital are overburdened and slow. (Present Venue Provisions, at 50.) In fact the District Court judges of the District of Columbia are less burdened than the national average. (Present Venue Provisions, at 50.) Furthermore, the Federal District Court in the Nation's capital moves faster

than Federal District Courts nationwide. The U.S. Court of Appeals for the District of Columbia, while not as prompt as the national average, still acts more rapidly than the Courts of Appeals for the two Western circuits that are offered as places to which to shift litigation from Washington. (Present Venue Provisions, at 50-51.)

Third, there are a certain number of "horror stories" that circulate to "prove" the need for a change in the law. (Present Venue Provisions, at 44-45.) I will not go into the detail of analyzing each of those cases, which are discussed in my attached article, but will note that once you subtract the cases where nobody moved to change venue out of Washington, you are left with three cases. One can certainly make a plausable argument that the judges in those three cases might well have done better, in retrospect, to rule other than the way they did in balancing the factors relevent to venue. (See list of cases where motions to transfer venue were granted in Present Venue Provisions, at 45-46.; Those three cases, which were not all decided in the same year, must be seen in relation to the total figures of over 63,000 cases involving the United States filed in District Court in a single year. (Present Venue Provisionns, at 48.) Quite frankly, I would have thought 3 cases out of 60 plus thousand cases, or even half that if you exclude the suits where the government was the plaintiff, amount to pretty good odds. The figures indicate that justice is being done, not that an injustice needs correction.

When the United States Department of Justice last testified on the subject of venue, the Department concluded that "the present venue statute is working in an adequate and just manner." The Department continued: "There are not an inordinate number of cases tried in the District of Columbia and the Department of Justice makes an effort to transfer cases to a local forum when the issues are ones which could be better handled there."

(Present Venue Provisions, at 42-43.) Subsequent evidence has not contradicted this evaluation.

Fourth, some proponents of venue switch legislation, particularly James Watt in testifying for the proposal prior to assuming his present office, confused the rhetoric of the Sagebrush Rebellion with the merits of the proposal. (Present Venue Provisions, at 52, 54.) He attacked Washington's "elite wisdom" and "foreign" judges. (Present Venue Provisions, at 52, 54.) The verbage is misplaced. One need not disavow sympathy with many Americans' feelings of not being listened to and considered by government to restate the obvious: we are not talking about local laws and local judges. We are talking about Federal laws and Federal judges. Some may contend that Congress has enacted a few too many laws, but that is not the judges' responsibility. Theirs is to enforce and apply the laws that Congress has chosen to enact and to recognize in doing so that these are national laws meant to be applied uniformly throughout the nation so that citizens are not subject to different sets of requirements under the same laws dependent on what circuit or judicial district they inhabit. It is not an adequate answer to reply that the Supreme Court will settle these issues. In fact, the Supreme Court is unable to review a substantial number of direct conflicts between the circuits. (Present Venue Provisions, at 58.)

Moreover, Washington is the capital of this nation. Whether some of the Sagebrush Rebels like it or not, Washington is, in the words of our Constitution, "the Seat of the Government of the United States." (Present Venue Provisions, at 52.) The Congress, the Supreme Court, the President and most of the ranking members of the Executive Branch are in Washington. Those who make the decisions, the review of which forms the subject of litigation, are usually in Washington. If testimony

is required, it may be theirs. Moreover, the private sector is also present in Washington. The industry trade groups, the national labor organizations, the public interest communities, and the lawyers for all of them - all these are present in Washington. As a result, when one of these private groups sues the United States or its officials, it is often not illogical that such a suit be permitted in the Nation's capital.

Fifth, the premise of the venue switch bill, that one may, without too much danger of encouraging extra litigation on the subject of venue itself, distinguish that which is "local" from that which is "National" is simply wrong. In the following examples, please try to figure out who is "substantially affected" or, worse yet, who is subject to a "substantially greater impact." If the Forest Service adopts or fails to adopt rules concerning the National Forest Lands at Lake Tahoe, is there a substantially greater impact on those few who inhabit the basin (and the Eastern District of California or the District of Nevada) year around or on the many who come to the basin from the Northern District of California for recreation? (See Present Venue Provisions, at 56-58.) To borrow an example from the excellent editorial against the venue switch in Regulation, a publication of the American Enterprise Institute, assume a lawsuit to set aside as too stringent an E.P.A. standard on auto emissions. Which districts are "substantially afected" and which are subject to "substantially greater impact" -- those with manufacturing plants? Those with auto dealerships? Those in which polluting autos will be driven? I do not know the answers. I suspect that nobody else does either.

The principle operative words of this bill are ambiguous in the extreme. Their presence will not only invite but will demand threshold litigation. (Present Venue Provisions, at 58-59.)

Phrases which occupy less pivotal roles are equally ambiguous. The phrases "local environmental nature" and "any other Act of Congress relating to environmental quality" will invite further dispute.

Sixth, the venue switch proposal may increase the number of cases in absolute terms. If a Federal agency adopts a nationwide rule which affected industries believe to be illegal, instead of being able to unite in a single suit in the Nation's capital, the separate companies may have to bring suits wherever they are located, leading to a multiplicity of litigation. (Present Venue Provisions, at 59.)

Seventh, there can be situations in which a plaintiff may be whipsawed out of court completely. (Present Venue Provisions, at 59.) If, for instance, a Federal defendant had to be sued under 1391(e) where there is a substantial effect, but a non-Federal defendant had to be sued under 1391(b) in some other district, plaintiff could be left without a forum in which to try his case. Section 1404, the venue transfer provision, afords no relief, because the forums to which a matter might be transferred all demand a "substantially greater impact."

Eighth, I will note but not address one other problem which will be discussed by another witness. Proposed section 2112(b)(4) repeals by implication numerous statutes where Congress has previously enacted separate venue provisions. Of course by not amending those sections, it will serve to mislead counsel who may be expected to rely on sections found in relevant portions of the U.S. Code.

Ninth, a principal effect of this bill will be to raise costs for public interest groups. (Present Venue Provisions, at 59-60.) Such groups, whatever their specific goals, typically are short of money. Those interested in national affairs try to raise the funds to maintain a Washington office to oversee

and influence the activities of the Congress and the Executive Branch in those areas in which they are interested. That is our system working at its best. Sometimes these organizations have to go to court when they believe the law is being violated and they seek trial of their case. These groups, which often are spokespersons for national constituencies, may not have the funds to support litigation, even well-founded litigation, all over the country. They may be able to afford such activity where they have an office - in the Nation's capital. Again, I do not say that this concern of public interest groups should be a predominant one which outweighs the interests of others. I only say that they too should be considered.

Finally, let me turn to a question that must underlie this entire venue switch proposal. What does it do? Does anybody know what it does? Two years ago when hearings were held on similar bills, nobody seemed to know what they would do. I have seen no evidence that anybody, including those who would persuade Congress to adopt such legislation, has found out in the interim. The proposal is presumably aimed at a small fraction of the one percent of the cases that are environmental. Indeed, the proposal may be aimed at as few as three cases. Unfortunately it also covers the other 99% of the civil litigation against the government. Two years ago the Administrative Office of the Courts stated that "there is no way to determine what effect a broad amendment to the general venue statutes... would have opon caseloads and litigation processes." (Present Venue Provisions, at 62.) James Watt, testifying then on venue shift proposals applicable to all civil suits agsint the government, said, "Frankly, I have not thought through all the potential situations which might be affected by the all-inclusive nature of the bill." (Present Venue Provisions, at 62.) It is now two years later, and I submit, most respectfully, that nobody seems to have thought through the implicaitons for all those other 99% of the cases.

Let me conclude. The development of venue legislation has been a history of opening doors to give citizens their day in court. The proposed legislation would close them. Present law recognizes a variety of factors relevant to where a case is tried - local interest, the parties' convenience, national interest, the sound administration of justice. All are factors relevant to the selection of a forum. The proposed legislation would end this flexibility and substitute a rigid rule designed to make one factor, local interest, the only factor in venue selection. To those sensitive to the variety of factors traditionally relevent to the selection of a forum, the proposal offends against good sense.

THE NEW YORK TIMES, FRIDAY, FEBRUARY 12, 1982

Venue, Periled

By Nicholas C. Yost

WASHINGTON — Congress is about to consider a proposal that, if enacted, would severely curtail citizens' ability to ensure that the executive branch obeys the law.

One or more floor amendments on "venue" — that is, where lawsuits are tried — are expected to be offered to regulatory reform legislation Congress is considering. The amendments limit citizens' opportunity to sue the Government in the District of Columbia, forcing them to bring such litigation elsewhere.

The ostensible purpose of this proposal to shift venue out of the capital is to bring the Government closer to the people. The actual purpose and effect is to make it more difficult for people to make the Government obey the law. The proposal is a threat to us all and should be defeated.

The amendments are authored by Senators Paul Laxalt, Alan K. Simpson, and Dennis DeConcini. James G. Watt, when president of the Mountain States Legal Foundation, was a principal spokesman for the proposal, which was originally aimed at environmental litigation but has been expanded to all suits against the Government. It would force public-interest litigation into courts so dispersed as to make citizen overseeing of Government decision-making immensely more difficult. Public-interest groups that support a Washington office to keep an eye on Government activity may be unable to afford to travel around the country when they conclude that the Government is breaking the law and seek trial of their case.

Traditionally, courts have balanced the interests of justice and the convenience of the parties in deciding where a trial should be held. Sometimes local interests rightfully predominate, but in others the national interest or the national significance of the precedent being established may be more important factors. In addition to cost, there are five reasons why the proposal should not be enacted.

First, the premise of the proposal, that courts in the capital are overburdened and slow, is wrong. Of civil litigation to which the United States is a party, only about 3 percent is brought in the District, according to the Administrative Office of the United States Courts. Further, of such civil litigation nationwide, only about 1 percent is environmental. The Federal District Court in Washington has a caseload that is less than the national average per judge, and that court deals with cases more expeditiously than its average counterpart nationwide. The Court of Appeals for the District, while not as fast as the national average, still disposes of cases more expeditiously than the two Western circuit courts.

Second, proponents of the venue switch "forget" that Washington is the nation's capital. Officials who make the decisions and are being sued are in Washington. Industrial trade groups, labor, and the public-interest groups are all here, as are witnesses to challenged decision-making and records that will be introduced in court. Sometimes it just makes sense to try a case where all the participants in the trial are situated.

Third, the proposals have defects in draftsmanship so severe that they would fail to achieve their intended purposes. The most far-reaching measure, Senator Simpson's, amends a 1962 venue law but fails to amend the older law under which all lawsuits against the Government before 1962 had to be brought in the District. His proposal would make a sieve, not a law.

Fourth, if the law was enacted, and assuming it had no holes, nobody knows what it would do. Presumably aimed at a small fraction of the 1 percent of the cases that are environmental, its breadth also covers the other 99 percent of the civil litigation against the Government. The Administrative Office of the Courts has said that "there is no way to determine what effect a broad amendment to the general venue statutes . . . would have upon caseloads and litigation processes." Even the proponents are unsure. Mr. Watt, testifying in 1980 on venue-shift legislation applicable to all civil suits against the Government, said: "Frankly, I have not thought through all the potential situations which might be affected by the all-inclusive nature of the bill."

Fifth, in some instances, the proposal could limit venue to a court that lacks jurisdiction to decide the case, denying the citizen any relief.

Local interest is a valid factor in deciding where a lawsuit should be tried. So is national interest, and so is the convenience and cost to parties in a trial. Under present law all are considered. Under the proposal to switch venue, only the local interest would be considered. That would be a mistake.

Nicholas C. Yost served as counsel to the California Environmental Quality Study Council under Gov. Ronald Reagan and as general counsel to the Council on Environmental Quality under President Jimmy Carter.

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Hon. Patrick Leahy
United States Senator
U.S. Senate
Washington, D.C. 20510
(Attention: Terry Schubert)

Dear Senator Leahy,

This letter responds to the questions you submitted to me for inclusion in the hearing record of the Judiciary Committee's venue hearing.

1. No. Local impact is supposed to be considered by the courts under existing law. S. 2419 would not introduce a hitherto ignored factor to the courts' considerations, but would rather make this one factor paramount in venue selection. Justice would not be served by making venue selection the creature of one factor, local interest, at the expense of the many factors traditionally balanced to make venue determinations.

2. a. "Substantially affect" is a term that invites lawyers to argue. "Substantially greater impact" is a still more cumbersome term, which requires lawyers to argue and judges to decide whether one impact is greater than another and, if so, how much greater.

b. The comparable standard of existing law which springs most rapidly to mind is the "significantly affect" standard for requiring an environmental impact statement under the National Environmental Policy Act. Those words have, I believe, been the subject of more litigation than any other term in NEPA. (I should add that a general phrase of that sort is appropriate in NEPA to provide a flexible cutoff for administrators and judges to apply in determining whether an environmental impact statement is needed. The alternative would be excessively detailed statutory line drawing by Congress. In the case of venue

selection, however, the standards which have evolved through the common law are sufficiently clear and just so that the introduction of a new litigation-inviting phrase is not needed.)

c. Yes. The present standards of 1391(e) are clear as to the four possible sites for venue. By introducing a subjective term, a legal "mush word" if you will, lawyers will be encouraged to contest and judges will be required to decide what is meant.

d. The type of fact finding that will be required is limited only by the ingenuity of the litigators tempered, I hope, by the good sense of the judges. In brief, each side is invited to make whatever factual showing is necessary to convince a judge that there is a substantial effect or a substantially greater effect in the district where that side seeks to try the case.

e. The Courts of Appeals are ill-equipped to make the kinds of factual comparisons of effects required by the statute as proposed.

3. a. No. I have no idea which is to be preferred, many minor or a few major impacts. It is this very imprecision that is a major vice of the bill.

b. I do not know, but advocates will certainly make the argument that under the proposal some type of analysis akin to regulatory impact analysis will be needed if that will serve their clients' interest.

c. I do not know. I cannot tell.

Please do not hesitate to contact me if I can be of further assistance.

Yours truly,

Nicholas C. Yost

Washington address:

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Questions

1. Does infusing the local impact concept to the current venue provisions in any way improve the fairness or efficiency of the courts in handling litigation?

2. a. How well will the standards of "substantially greater impact" or "substantially affect the residents", employed by S. 2419 guide the courts (and litigants and petitioners as well) in their efforts to locate cases and appeals?

   b. Can you think of a comparable standard in existing law and comment on the volume of litigation (or lack thereof) that has resulted?

   c. Does S. 2419 in fact create the potential for "mini-trials" to determine proper venue?

   d. Please comment on the type of fact finding that might be necessary.

   e. How well equipped will the circuit court be in this area?

3. a. Do you have any idea, under the tests to locate and transfer cases in S. 2419, which district would be preferred--a district in which there are many minor impacts or one in which there are very few but quite major impacts?

   b. Is it conceivable that some type of analysis akin to the regulatory impact analysis would be employed to make such a determination?

   c. Which should prevail? How can you tell?

STATEMENT OF

ROBERT S. BLACHER

TERRIS & SUNDERLAND

WASHINGTON, D.C.

I appreciate the opportunity to appear before the Committee today to testify regarding S. 2419, a bill that would amend various sections of Title 28 to limit the number of cases against the federal government that would be heard in federal courts located in the District of Columbia.

I am an attorney with the law firm of Terris & Sunderland which is located in Washington, D.C. Our firm is a private, "public interest" law firm which specializes in environmental and civil rights litigation. We have represented national public interest groups such as the Natural Resources Defense Council, Inc., Sierra Club and others in environmental litigation. We also frequently represent local citizens groups in challenges to environmental actions affecting their communities.

My purpose in appearing here today is to discuss the practical problems that litigants will experience if denied the opportunity to choose the D.C. federal courts as the forum for the litigation when that is most appropriate. In preparing this testimony, I have reviewed our firm's litigation docket for the past ten years. In doing so, I was struck by how few "local" environmental cases have been brought by our firm in the D.C. courts, but there is a simple explanation. Under existing law, the courts have made it clear that they will not tolerate forum shopping. Under 28 U.S.C. 1404, as it has been interpreted by the courts, existing law makes it futile for us to bring the vast majority of "local" environmental cases in D.C. even if we wanted to. It would simply cause expense for our

clients because we would be forced to defend a forum non conveniens motion and we would be highly likely to lose.

Thus, under existing law, there are sufficient disincentives to environmental plaintiffs to discourage attempts to forum shop in the District of Columbia even where that court has venue under 28 U.S.C. 1391(e). If a case filed in D.C. is truly more appropriate for another district court, either the government or intervenors will move under Section 1404 to transfer, that motion will cause delay, and therefore money to our clients who can often ill-afford it, we will most likely lose in opposing transfer and, therefore, there is no reason for us to file the action in D.C. in the first place.

The purpose of this bill is to deny discretion to the federal district courts in making venue decisions. By amending Section 1391(e), the bill would limit the number of cases that can be filed in the D.C. district court in the first place. And, by amending Section 1404, this bill, if enacted, would take away from federal courts the discretion to perform the careful balancing of considerations identified in Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507 (1947). Rather, in cases where venue would still lie in the District of Columbia under Section 1391, the court would be required to transfer to another district where the impact of the case is "substantially greater."

My purpose in testifying today is to give a concrete example of the unfairness that can result from denying plaintiffs the opportunity to seek judicial review in the District of Columbia. I will focus particularly on the issue of availability of witnesses, especially the availability of compulsory process to compel the testimony at trial of federal government officials who work in D.C. and who are

involved in the decisionmaking process that is in issue. My point is to show that, by forcing certain actions to be brought in courts outside of D.C., this legislation will deny plaintiffs the opportunity to compel the live testimony of government officials who work in the nation's capitol even when that testimony is critical to accurate fact-finding by the courts.

Of course, I cannot find for you the perfect example, because when availability of Washington officials to testify is an issue, under existing law, the case can be brought in D.C. and it will likely stay here. But, I can give you an example of what can happen under this bill by explaining a case that we recently chose to bring in the Southern District of New York even though Washington officials were key witnesses and venue existed in the District of Columbia as well as in New York.

In Natural Resources Defense Council, Inc. v. The City of New York, ___ F.2d ___ (C.A. 2, 1982), petition for certiorari dismissed pursuant to Rule 53, __ U.S. ___ (April 19, 1982), we represented the plaintiffs in a challenge to a proposal to demolish two historic Broadway theaters, the Helen Hayes and Morosco, in order to build a new luxury hotel in Times Square. The proposal to demolish the two theaters was opposed on a number of different grounds in our original complaint, primarily under the National Environmental Policy Act of 1969, 42 U.S.C. 4321, et seq. However, we also claimed that our clients had been denied their right under the National Historic Preservation Act, 16 U.S.C. 470, et seq., to appeal the decision that the Morosco Theater was ineligible for the National Register of Historic Places. Rather than dispute this latter claim, the government entered into a stipulation providing for an expedited decision by the Secretary of Interior on whether the Morosco

was eligible. On November 17, 1981, the Secretary determined that the Morosco was indeed eligible for the National Register.

This eligibility determination triggered the obligation of the Advisory Council on Historic Preservation, a federal agency located here in Washington, to consider whether the Morosco theater could be saved. With blinding speed, the Advisory Council approved demolition of the Morosco on November 21, 1981, the day after the City of New York initiated the Council's review procedure, and the same day that our architect presented to the Council his plan to build the hotel over the two theaters.

Plaintiffs received reliable information that the Council's unprecedented haste in rejecting alternatives to demolition of the two historic theaters was brought about by interference by the White House in the Council's supposedly independent considerations.

At this point, I should make clear that our original NEPA complaint had been filed and was still pending in the Southern District of New York. When we learned that the Council's decision might well have been biased by political factors, we had a choice. We could either amend our complaint in the Southern District or file a new action in D.C. We chose not to trigger the inevitable, expensive and time-consuming venue fight that would have occurred in the D.C. courts, so we amended our complaint on November 24, 1981, and kept the entire case in federal court in New York City.

The only reason we brought our amended complaint to New York was because a related case was already pending there. Under Section 1391(e), as it currently stands, we clearly had the right to file a new complaint in D.C. And, under Section 1404, as it now stands, the unavailability in New York of wit-

nesses who were critical to the claims in our amended complaint would have likely caused the D.C. courts to reject a transfer motion. However, under the law as it would be amended by S. 2419, our amended complaint could only have been brought in the Southern District of New York. What in fact happened in our case demonstrates the injustice that this bill can produce.

The Advisory Council decision to permit demolition of the Morosco Theater involved four government officials, all located in Washington, D.C. The decision was participated in by the Chairman of the Council, its Executive Director, its Director of the Office of Cultural Resource Protection and by a staff architect.

During discovery, we took the depositions of the Chairman and the Executive Director, who admitted that they had been urged to act expeditiously by Lyn Nofziger, then Assistant to the President for Political Affairs, but denied that these White House contacts had affected the decision-making process. However, the Director of the Office of Cultural Resource Protection was more forthright in his deposition testimony and in affidavits. He admitted that the Nofziger call, which came at a time when the Advisory Council was appealing to the White House an OMB decision to cut its budget in half, permeated and influenced the Council's decisionmaking process.

All of the depositions were taken in the District of Columbia under subpoenae issued by the D.C. federal district

court. But, when it came time for trial, the federal district court for the Southern District of New York had no authority to compel the appearance of witnesses who live and work in D.C. See Federal Rules of Civil Procedure, 45(e)(1). We asked the government to voluntarily produce the Advisory Council officials who had admitted political interference. The government refused, and only brought to trial those officials who had denied political motivations.

Of course, all of the depositions were admissible. But, the case presented to the district court was the live testimony of officials denying plaintiffs' claim whom the government had voluntarily produced and the sterile transcript of the officials who had admitted that our claim was meritorious and whom the government had refused to produce as witnesses. To add insult to injury, the district judge made a finding on credibility and determined that the testimony of a witness he had never met was "the plaintive wailing of an entrenched bureaucrat," whereas he credited the live testimony as truthful.

Any litigator knows that the opportunity to depose a witness, find out his story, and then present it through him at trial is far preferable to having to present deposition testimony which is often filled with irrelevancies. The purpose of a deposition is to discover, to find out what the story is, to pursue blind alleys and to determine what the critical facts are. Thus, the testimony of a key government official which is presented through his deposition testimony is necessarily far less persuasive and far less meaningful to the fact-finder than live testimony. Plaintiffs who are forced to rely on the deposition testimony of important witnesses are particularly prejudiced when the government

is able to pick and choose the witnesses it wishes to present at trial, and plaintiffs have no effective recourse.

I am not contending that this situation will occur with great frequency. It is true, as the sponsors of this legislation have pointed out, that much environmental litigation does not involve the presentation of testimony by witnesses. But, I submit that the few isolated instances of alleged forum shopping that the sponsors of this legislation rely upon to support their bill do not outnumber the frequency with which witness problems will arise under this legislation. I urge the Committee to consider carefully the effect of its legislation. Before attempting to cure what appears to be a very small problem with very strong medicine, I would urge the Committee to consider carefully whether the number of times its legislation will produce injustice is not greater than the number of occurrences where the courts may have erred in retaining venue in cases that belonged elsewhere.

I thank the Committee again for the opportunity to appear here today and would be pleased to answer any questions about the practical effects of this bill on environmental litigation.

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ROBERT S. BLACHER
CAROLYN A. SMITH

May 24, 1982

Honorable Patrick J. Leahy
United States Senate
427 Russell Senate Office
Building
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for the opportunity to respond to the written questions you submitted regarding S. 2419. I believe the first of your questions was covered adequately during my testimony on May 13. Your third question, dealing with the effect of the bill on civil rights litigation, will be addressed by Ellen Josephson of the National Legal Aid & Defenders Association in a letter to the Committee.

Thus, particularly in light of the short time that the Committee has allowed between the end of the hearings and the closing of the record, I will limit my response to your second question which deals with the effect of S. 2419 on special venue provisions in statutes like the Clean Air Act.

Q. a. In what way does S. 2419 affect special venue provision in statutes like the Clean Air Act?

A. Section 1, paragraph (4) of the bill provides:

> Notwithstanding any other provision of law, a petition for review of any agency rule reviewable directly in a circuit court of appeals may be filed in the judicial circuit in which the person seeking review resides or has its principal place of business.

This provision overrides numerous statutes which provide that appeals of regulations having nationwide impact may be filed only in the D.C. Circuit Court of Appeals.

To take the Clean Air Act as an example, 42 U.S.C. 7607 provides that appeals of "nationwide" regulations may be filed only in the D.C. Circuit. Thus, under existing law, when the stack height regulations were promulgated recently and designated by the Administrator of EPA as nationwide rules, the appeal could only be filed, and was in fact filed, in the D.C. Circuit. There was no fight over venue. Under 42 U.S.C. 7607, exclusive venue lay only in one court.

It is instructive to compare what would have happened if S. 2419 had already been enacted. The stack height regulations undoubtedly affect persons or businesses residing in

every juducial circuit. In an attempt to forum shop, it is likely that the rule would have been appealed to each of the twelve courts of appeals. Then, under S. 2419, the Administrative Office of the U.S. Courts would use a random selection process to decide the court in which the record should be filed. That court would then be faced with motions for a change of venue to a circuit where the impact was "substantially greater." Where is the impact of the stack height regulations greater? In the Sixth Circuit, where many of the major coal-burning utilities reside? Or in the First Circuit, where the acid rain produced by the emissions from tall stacks is causing serious environmental harm? We would expect the venue fight to be long and costly, to be focused on factual issues that might be hotly contested, and to do nothing more than delay resolution of the merits while the collateral venue issue is being fought over.

There can be no doubt that S. 2419 overrides the Clean Air Act's venue provision. As the sponsor of this legislation has stated, in analyzing identical language when it was offered as an amendment to the regulatory reform bill (Daily Congressional Record, February 10, 1982, page S 759):

> The amendment * * * would supersede various provisions which now require petitioners to seek review of some rules solely in the District of Columbia Circuit. 9/

Footnote 9, which appears id. at S 761, lists as examples the Clean Air Act, the Noise Control Act, the Federal Energy Administration Act, the Outer Continental Shelf Leasing Program, the Resource Conservation and Recovery Act and the Safe Drinking Water Act. This list is not even intended to be all-inclusive. There are clearly many other statutes where Congress has chosen to vest exclusive venue in a particular court and where S. 2419 would, in one broad sweep, overrule those decisions.

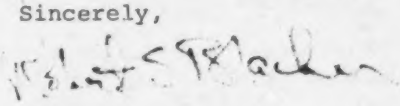
To return to the example of the Clean Air Act, it was only 5 years ago, during the 1977 Clean Air Act amendments, that the Congress chose to amend 42 U.S.C. 7607 to vest exclusive venue in the D.C. Circuit when nationwide regulations are being challenged. I have heard no compelling reason to overturn that recent judgment. More importantly, if such a change is to be made, it should be made on a case-by-case basis by the authorizing committees which are familiar with the issues involved in the particular legislation. Particularly in the case of the Clean Air Act, where the Senate Environment Committee and House Energy and Commerce Committee are currently marking-up amending legislation, it seems particularly inappropriate for a bill like S. 2419 to be enacted which overrides existing law in such a wholesale fashion.

> Q. (b) How would such a change affect you in your practice?
>
> A. This change undoubtedly will increase the costs of challenging agency regulations because time will be spent in nearly every case fighting over the venue issue whereas now that issue has been resolved conclusively by statute. Although public interest litigants may be able to recover their attorneys'

fees and expenses under certain statutes, including the Clean Air Act, the fee award comes only at the end of the litigation. Thus, the litigants must be able to bear the expenses all during the pendency of the litigation. Already, such cases often take more than a year. With the addition of the time spent litigating the venue issue, the delay in payment and the increase in costs may make it difficult for citizens' groups to afford to challenge agency rules that they believe to be unlawful.

Thank you again for the opportunity to comment on S. 2419.

Sincerely,



Robert S. Blacher

RSB/lab

TESTIMONY OF THE

NATIONAL WILDLIFE FEDERATION

The National Wildlife Federation appreciates the opportunity to present its views on S. 2419. The Federation is the largest grass-roots conservation organization in the country, with over 4 million individual members and supporters, and affiliated groups in all 50 states, Guam, Puerto Rico and the Virgin Islands. Though the Federation relies primarily upon research, education, and public information to foster the wise use of our natural resources, it does resort to litigation where other means of dispute resolution are unavailable or ineffective. We currently have 12 staff attorneys, a docket of some 50 cases (including formal administrative actions), and four field offices located in Colorado, Montana, Oregon and Alaska. Though the bulk of our Federal litigation is not brought in the District of Columbia, nearly all of those cases having national significance are litigated here. The ability to litigate "generic" national issues in a place where the principal parties, the records, the witnesses, and the lawyers are all located is fundamental to the operation of a national citizens conservation organization like NWF. Hence, we are obviously concerned about proposed venue reforms, like some of those contained in S. 2419, which seek to eliminate the District of Columbia as an optional forum in an undefined and unquantifiable number of instances.

At the outset, we wish to make it clear that NWF is not against judicial reforms which are designed to broaden access to justice or improve its administration. Thus, we would support, at least in concept, proposals to eliminate the "race to the courthouse" through random selection of appellate courts to review certain agency rulemakings (i.e., those not already statutorily assigned to particular courts), to provide special notice to State Attorneys General of certain cases

(not limited to "environmental" cases) filed in the District of Columbia, and to amend 28 U.S.C. 1404 to expressly authorize intervenors to file transfer motions in cases involving Federal defendants. However, we do not support changes which are intended to give either side an advantage in litigation, to selectively impose additional procedural burdens on environmental litigants, or to preempt a plaintiff's choice of forum for reasons unrelated to the convenience of the parties or to the interests of justice. Unfortunately, S. 2419, while professing to do the former, is in fact skillfully crafted to accomplish the latter.

A great deal of thoughtful commentary by a number of highly qualified people representing opposing points of view has already been generated on this subject. In particular, the study recently published by the National Legal Center for the Public Interest entitled "Venue at the Crossroads" provides lucid pro and con arguments, plus a detached academic view of the questions raised by S. 2419. An article in the February issue of the American Enterprise Institute Journal by Antonin Scalia entitled, "Venue Reform: Sue West, Young Man?," also provides some valuable insights regarding the philosophical and practical problems posed by these measures. It is of no small moment that Professor Scalia, hardly a "rabid environmentalist" or a judicial activist, concludes that the approach taken in S. 2419 is wrong as a philosophical as well as a practical matter.

After reading through this material, and carefully weighing the pros and cons of the broad-scale venue switching legislation embodied in S. 2419, we conclude that no case has been made for its passage. Certainly, the few isolated instances of claimed "abuse" do not justify this proposed radical departure from the current law of venue--a departure which will inevitably lead to even greater abuses, though perhaps favoring different interests, than those now cited by the proponents of S. 2419. To be sure, no system is perfect, but the current venue system

is at least neutral as to the choice of forum and fairly predictable, given the large body of case law that has been developed since its last revision in 1962. The free-wheeling transfer requirements of S. 2419 would introduce highly subjective judgments into the process and make it nearly unpredictable, while driving up the costs and delaying the outcome of litigation.

In our view, S. 2419 would codify, not remedy, forum shopping. As so many commentators--conservatives and liberals alike--have pointed out, the real purpose of venue switching is to shift environmental cases to courts that are presumed more likely to restrict the scope of environmental protection laws (see Scalia, supra). The assumption seems to be that any judge, even a life-tenured judge of the Federal bench, who has to answer to the neighbors for his or her decision will be less of a crusader for environmental protection than a judge far removed from the potential backlash of public sentiment. Whether or not such an assumption is valid--and we would be the first to admit to a preference for trying an acid rain abatement case in the Adirondacks of New York as opposed to the Ohio River Valley--it is philosophically unacceptable. The fact that forum shopping does occur (though in much less degree and with far less predictable results than most would assume) is no reason to institutionalize it. Yet that is precisely what S. 2419 would do, by requiring courts to transfer cases to places where the action would have a "substantially greater impact"--whatever that means--regardless of the costs to the original parties.

Though proponents of S. 2419 continue to argue that it is not intended to bias the outcome of environmental cases, none of their reasons withstand scrutiny. The principal arguments and rebuttals are as follows:

- D.C. has become a "national court," handling a

disproportionate number of environmental cases. In fact, as every survey shows, environmental cases in D.C. account for only a fraction of the national docket (about 7% last year).

• Non-parties that may be "affected" by the outcome of litigation may not be aware of its existence. Aside from the practical difficulty of knowing who all those people are and finding a place that is more convenient for them, it would be far easier and cheaper to expand notice requirements than to cart parties, witnesses, records, etc., around the country in search of "affected interests."

• There is a need to "open up" more Federal courts to the average citizen. To our knowledge, no Federal court is presently closed to anyone. On the other hand, S. 2419 seeks to close the one place--the District of Columbia--that is accessible, through representative groups like NWF, to millions of average citizens who, as a practical matter, would have no other means of having their interests vindicated.

• There will be greater public acceptance of decisions affecting "local" resources if the decisions are made by "local" judges. As so many others have said, however, neither the judges nor the issues in these cases are "local." (See Scalia, supra.) In any event, neither the merits of a particular decision nor the quality of justice overall can be measured by popularity contests. Even in the Ruby Lake case, the supposed archetype of the abuses that occur under the current venue provision local interests were well represented by the State, which intervened, and by the 6 Nevada residents who testified.

Regardless of how one views these philosophical considerations, it is clear that the costs associated with S. 2419 more than outweigh any of its hoped-for benefits. Without question, this new venue switching procedure will greatly increase the costs, delay, and uncertainty presently associated with major Federal litigation. Indeed, the costs of first litigating where the case should be litigated will in some cases

exceed the costs of litigating the merits themselves (because of the extensive factual proof involved in resolving, for example, what constitutes a "substantially greater impact" and how many people are "affected" by it).

Moreover, most of this expense will be wasted since, in the end, the same judges will be interpreting S. 2419 who are presently deciding transfer motions under the existing "for the convenience of the parties and in the interests of justice" test under § 1404. Though S. 2419 would change this formulation by elevating "local concerns" over the convenience of the parties, it would also allow judges to refuse transfer to "local" districts where the "interests of justice" would not be served. Granted that the legislative history could limit the scope of this exception, there is still no way to predict whether S. 2419 would effect the kind of large-scale reallocation of Federal cases envisioned by its sponsors. What is certain to happen, however, is an increase in the costs of litigation, which will have a serious chilling effect on litigation by public interest groups, thereby undermining the citizen suit provisions presently contained in numerous Federal environmental statutes. Though some would not lament the loss of citizen enforcement of environmental protection, Congress has consistently viewed it as of critical importance to the achievement of national policies respecting the environment. See, e.g., 30 U.S.C. 1202(i) (Strip Mine Act).

In sum, NWF disagrees with both the factual and the philosophical predicates that underlie S. 2419. Factually, the evidence presented does not prove that a disproportionate number of cases are being heard in Washington, that the D.C. courts are systematically abusing their discretion to transfer cases based on existing criteria, or that these courts are

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fatally infected with a pro-environment bias. Philosophically, we dispute the notion that ill-defined "local interests" should, as a matter of law, take precedence over all other factors courts presently consider in deciding venue questions. Finally, we object to any proposal with the punitive purpose of preventing national citizens organizations from litigating national issues in the nation's capital. Indeed, we believe that S. 2419 is hostile to the very concept of citizen access to American justice. We urge the Senate to reject it.

Prepared and submitted by:

Patrick A. Parenteau
Vice President
Resources Conservation Department

NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036 202—797-6800

May 18, 1982

The Honorable Alan K. Simpson
6205 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Simpson:

During the course of a hearing on S. 2419 (venue reform) last Thursday, you expressed concern over remarks attributed to NWF in a news story carried by The Washington Post on that same day. The story quoted an NWF representative as saying, in reference to litigation brought in Washington, D.C., that "All the experts are here. This is where national policy is set. There is no reason to move."

Taken out of context, these words do seem to imply, as you noted, arrogance favoring the East over the West. However, I am writing to assure you that no such regional arrogance was intended, and that the context from which those words were taken had to do with Washington frequently being the place where the Government's expert witnesses and decision-makers are located. As you know from your own law practice, it is often necessary to try cases where factual discovery can be conducted and where witnesses can be subpoenaed to testify. To be sure, that place will not always be Washington, D.C., but our intent was to point out that in some cases the critical evidence required for a decision would not be accessible, whether for legal or economic reasons, anywhere but Washington.

I sincerely regret any impression left by the news story that NWF does not believe there are any "experts" outside Washington. If we really believed that, or acted as if we did, I'm afraid we'd lose half of our affiliates. As you know, some of our finest conservation leaders, including our President Cliff Young, are Westerners. We are proud of their participation in Federation activities including, where necessary, litigation on behalf of sound resource management.

Senator, NWF places great value on the positive and friendly relationship we have always had with you, even though we might disagree from time to time on the specifics of conservation policies. It is disturbing to think this unfortunate incident may have placed some unnecessary strain on that relationship. If this letter does not serve its intended purpose of resolving any doubts about our reasons for opposing the broad-scale venue-switching proposals contained in S. 2419, please provide us an opportunity to meet personally to discuss it further. If you agree, we would like to have this letter added to the hearing record on S. 2419.

Sincerely,

Jay D. Hair

JAY D. HAIR
Executive Vice President

Senator SIMPSON. Well, we will proceed, sorry for that delay. Jerry Haggard and George Freeman, please proceed.

STATEMENTS OF JERRY L. HAGGARD, AMERICAN MINING CONGRESS, AND GEORGE FREEMAN, EDISON ELECTRIC INSTITUTE

Mr. HAGGARD. Mr. Chairman, my name is Jerry Haggard. I am presenting this testimony on behalf of the American Mining Congress. We appreciate this opportunity; I will be brief. And I should note that our written statement is also brief, and it is brief because, although this policy question presented in 2419 is important, it is also a simple and uncomplicated question.

That question is only this: Should suits concerning Federal agency actions be tried in the most appropriate local forum, as determined by the considerations of convenience and justice to the parties?

Now, as you are well aware, 20 years ago Congress recognized the desirability of local adjudication of Federal litigation when the Mandamus Act of 1962 was passed. The reasons given then by Congress for the passage of the 1962 act are helpful now, we believe, in the consideration of this proposed 1982 act.

Among those stated reasons at that time were, first, that defending a Federal official in a district outside of Washington does not constitute a burden on the Government, but, on the other hand, Congress found at that time, in those situations where it involves citizens, property, and causes of action that arose in other parts of the country other than Washington, that it did constitute a burden on citizens to come to Washington to defend those suits. Third, bringing actions locally allows the local judges to exercise their expertise and experience in such obtuse areas of the law as grazing, mining, and water rights.

Now, not many will argue that those reasons for venue reform that were expressed by Congress when the 1962 act was passed were not valid then or that their validity has changed now. What has changed, however, is the introduction of a new class of plaintiffs who can select a forum for Federal litigation. That new plaintiff class consists of the many so-called public interest groups and law firms, environmental groups and conservation groups with offices here in Washington, D.C. These groups frequently challenge actions in D.C. courts and sometimes even in friendly litigation that is arranged with Federal agencies, which has a much more serious and direct impact on interests far away. But then once a suit is brought, the individual citizens or organizations that live or work or are present in the area in which the direct impact of the litigation will be felt may not even learn of the litigation. Then, if they do learn of it, they may move to intervene, but even if they are allowed to intervene—and, as mentioned earlier by Dean Gellhorn, under present law it appears that intervenors will not be granted motions for a change in venue.

So it is these same local parties who may be most directly affected by the litigation and who obtained relief in the 1962 act from District of Columbia venue, who are stuck again in the D.C. courts the same as they were before 1962.

Now, as a side point, it was mentioned during Professor Sunstein's and Mr. Gold's and Mr. Parenteau's testimony that a suit should not be forced out of the District of Columbia if none of the parties want it moved. Under this bill, as I understand it, if the original parties are satisfied, it wouldn't be removed because each removal requires a motion by one of the parties. So I don't think that is a valid concern.

So I think we can consider Senate bill 2419 as merely updating the 1962 Venue Act to accommodate the changes in the nature of litigants occurring in the 1970's, and allowing the same class of private parties who received venue relief in 1962 to receive the same relief in 1982.

So these reasons for enacting Senate bill 2419 are really the same ones that were found to be valid when the 1962 act was passed.

Beyond these reasons, both proponents and opponents of this legislation have raised an additional reason for passing the bill. Statements are being made on both sides of the issue that environmental litigants have a better chance of winning in the D.C. courts than in any other jurisdiction. This may be true. But the point is, more importantly, that even if this is not true, such published statements as were read earlier by Mr. Burt, and similar discussions, create questions and perspectives among the general public that the D.C. Federal courts may have such a bias. We are convinced that this is not healthy for our judicial system. The mere suggestion that litigants have such reasons for selecting a particular forum for certain types of cases does tarnish the public confidence in the judicial system.

Therefore, we urge strongly that Senate bill 2419 be passed, and we appreciate the opportunity to present this testimony.

Senator SIMPSON. Thank you very much, Mr. Haggard. Mr. Freeman, please.

Mr. FREEMAN. Thank you, Senator. I thank you for permitting me to testify here today on behalf of the Edison Electric Institute, which represents the bulk of the electric utility industry in the United States, and to voice its and my own personal support for S. 2419.

I ask that my prepared testimony be included in the record as if read.

Senator SIMPSON. Without objection.

Mr. FREEMAN. I should note that that testimony deals in detail with only one key provision of the bill, proposed new subsection 4, which permits applicants to appeal agency rules to circuit courts of appeals other than the circuit for the District of Columbia.

The reason my testimony concentrates on that provision is twofold. First, from the perspective of the electric utility industry, which in many ways is not unique but it has its own special way of doing things, this is clearly by far the most important provision in the bill. I know that for other industries, like the American Mining Congress, the other sections of the bill dealing with district court litigation may be more important because of a different pattern of regulation and operation. The second reason is that I knew that most of the other witnesses would concentrate on the district court provisions.

I would like to say that when the previous panel was here, Mr. Blacher raised the question of the propriety of the Judiciary Committee dealing generically in this bill with matters of jurisdiction and venue that are addressed particularly in other substantive acts like the Clean Air Act and RCRA. In my prepared testimony, I anticipated this argument—it's the kind of argument we heard when S. 1080 was winding its way through the Senate. I point out in that testimony that when the Administrative Procedure Act was adopted back in 1946 as the then "Magna Carta" of how Federal agencies were going to operate and how appeals could be taken from agency rules, that act set forth rules of national uniform application to all Federal agencies. Subsequently in the seventies we had a trend of environmental statutes like Clean Air Act, RCRA and others in the energy field carving out special exceptions for certain preferred agencies, like EPA and DOE, in the areas of both procedure and jurisdiction and venue.

All the bill before you does is reassert that rule of national uniformity that the original draftsmen of the Administrative Procedure Act intended. And, indeed, it deals with matters, jurisdiction, and venue in the Federal courts that are certainly within the primary jurisdiction of this committee. Indeed, as those other acts were winding their way through Congress in the seventies, if you had asked for concurrent jurisdiction, I am certain under the Rules of the Senate you would have been accorded it.

So in dealing with these matters generically, you are simply reasserting the primary jurisdiction of this committee. And let me add that as a matter of policy, apart from the jurisdictional point, unless you deal with this matter generically at this time in this way, I doubt if Congress will ever close all those special interest loopholes.

Senator, I have been spending many a day in your committee's markup of the Clean Air Act, and I know the major problems you have had to wrestle with on that committee in that legislation. There the main focal point has been on the matters of substance in the act that have been so difficult. The matters of procedure addressed in S. 2419 could be dealt with there, but given the time pressures on that committee, I think it's more appropriate for you to deal with them here rather than there—though I should add that we would like help whichever way we can get it.

I would like to come back—having sat through the whole panel and listened to all the testimony—to where I think we come out on this key point exclusive of D.C. Court of Appeals jurisdiction in the appeal of agency rules. I note that most of the witnesses didn't deal directly with this problem. But Mr. Gold, speaking for labor, did deal with it. I was pleased to find out that if you listened carefully to what he said and read carefully his written testimony, his testimony for labor and mine for the electric utility industry are almost on all fours except for one point. He apparently agrees with everything that is on page 2 and 3 and 4 of the bill, through line 8, except for the second half of subparagraph (3), beginning at line 20 and going on over to the end of that provision. But the language that is troubling him is that if you appeal to a particular circuit court or, more likely, you file in one circuit and others file in other circuits and the lottery selection take place, the court which has

jurisdiction might be required to transfer that appeal to another circuit if another appellent or an intervenor moved to transfer and the court found that the review would have a substantially greater impact elsewhere, unless the interests of justice require otherwise.

Well, that's a pretty vague standard anyway. And I must say that if we could come out of this committee with the unified support of labor and industry for subparagraph (b)(1), (b)(2), and (b)(3), with those few words in it stricken, and still have subparagraph (4), we would still have 95 percent of the intended effect. We would then have a provision also that would meet the only rational objection voiced by Mr. Blacher to subparagraph (4). He said that if you took subparagraphs (1), (2), (3), and (4) together, and we had the lottery, that would be simple. But if after that we could get into a battle over motions to transfer and so forth, then that would complicate the process and be undesirable.

Well, let's give that up, let us appeal to any court of appeals in which we do business or reside, or the D.C. Circuit if the statute specifically permits you to. Senator, I would say in regard to your exchange with Assistant Attorney General Dinkins, I agree with your interpretation of your own bill on this point. An appellant would still have that option to appeal to the D.C. circuit under the Clean Air Act.

This if there were several appeals to multiple circuits we would have a lottery and that would usually end it.

Now, it is clear that even with the language stricken that labor objects to, the courts would retain their inherent power to transfer the case to another circuit when for whatever reasons the interests of justice requires but they would not be made a statutory mandate to do so.

I think that the change in this particular provision that labor has suggested would not only meet all the objections of organized labor but it would also meet all of the reasons advanced by the environmentalist panel for objecting to doing away with exclusive D.C. jurisdiction.

Senator SIMPSON. Could you summarize, Mr. Freeman, in just a few moments?

Mr. FREEMAN. Yes; I would like to just close with two points. First, if we turn briefly to the merits of the district court venue provision, I think the suggestion of Professor Gellhorn, that intervenors be permitted to make motions to transfer, merits very serious consideration, and I hope that the committee will give it that way.

I would like to close with the observation that by and large, all the members of our Federal judiciary are good judges. I think they are not only good judges but they are also unbiased judges, whether they sit here in D.C. or elsewhere in the United States. And I think if we agree to set aside any question of bias or speculations as to unconscious bias is from this issue, we will advance the cause. But once we do that, the only thing that remains as a matter of serious controversy over exclusive appellate jurisdiction is the balancing of conveniences. Those statutes that mandate exclusive D.C. jurisdiction conclusively presume that the convenience of the Government will always triumph over the convenience of the citizen. And I think that is the heart of what you are trying to do here

today is is to back out these dozen or so statutorily mandated "always-for-the-convenience-of-the-Government" provisions and permit the courts to balance conveniences on a case-by-case basis. That is all your bill does on this point. And that is why I think the overwhelming majority of the people in the United States support it.

Senator SIMPSON. That's a very interesting summary, as you placed that; indeed, the witnesses have testified about the convenience to the Government, the waste of money if they were to go somewhere else—that is a continual theme. And yet there is a waste of money by those who have to come here to do their litigating and their appealing, and that is very real. And perhaps we can reach a balance.

But you have given some very creative suggestions on transfer, lottery, and the rotation system that will be helpful.

And I thank you, Mr. Haggard, for your testimony. It's helpful to us as we try to fashion something to correct what I think a majority of the committee feels is a problem in this country.

So thank you very much, both of you, Mr. Haggard, Mr. Freeman. You have been very helpful. If there are other questions, and there may be from other members of the committee, they will be submitted in writing—perhaps there will be written questions. The record will be kept open until Monday, May 24, for further entry of material and submissions of statements or questions.

And I thank you very much, all of you. The hearing is concluded.

[The hearing concluded at 5:12 p.m.].

[Prepared statements follow:]

Statement of the

AMERICAN MINING CONGRESS

Mr. Chairman and Members of the Committee:

We appreciate this opportunity to present this testimony on behalf of the American Mining Congress which is a national trade association consisting of companies producing most of America's metals, coal and industrial and agricultural minerals, manufacturers of mining and mineral processing equipment and supplies, and engineering and consulting firms and financial institutions which serve the mining industry. My name is Jerry L. Haggard from the law firm of Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, and I am a member of the Public Lands Committee of the American Mining Congress.

The American Mining Congress, on behalf of its members, takes this opportunity to commend the Committee for considering improvements which should be made in the federal rules establishing venue and to voice its support and approval of S. 2419. This legislation would simply cause suits concerning federal agency actions to be tried in the most appropriate federal forum as determined in each individual case by considerations of convenience and justice to all parties. The bill would have no affect on the substantive requirements of environmental laws, consumer protection laws or any other federal laws. This bill would permit those cases concerning federal law and agency actions which have a substantial local impact to be decided in those local federal judicial districts or circuits in which that impact occurs.

Twenty years ago, Congress recognized the desirability of local adjudication of federal litigation with the passage of the Mandamus and Venue Act of 1962 allowing plaintiffs to choose either the District of Columbia or

another judicial district as the forum. The following reasons given then by Congress for the passage of the 1962 Venue Act are instructive in the consideration now of this proposed 1982 venue act:

> 1. The administrative determination in question is frequently made in the field, not in Washington, D.C. The federal official will be defended by U.S. attorneys who are present in every judicial district. Therefore, defending the official in a district outside of Washington, D.C. is not a burden on the government.
>
> 2. In those situations where the affected citizens, the property involved, and the place where the cause of action arose, are thousands of miles from Washington, D.C., to require the action to be brought in the District of Columbia, is a burden on the affected citizens.
>
> 3. Bringing actions locally is desirable from the standpoint of efficient judicial administration. Local judges experienced in peculiar areas of law such as water rights, grazing permits, and mining can handle those problems expeditiously and intelligently.
>
> 4. Concentrating litigation in Washington, D.C. burdens that court system.[1/]

Therefore, it was for these reasons that Congress passed the 1962 Venue Act to allow private citizen plaintiffs, complaining of a governmental action, to challenge that action in their home judicial district.

Not many will argue that those reasons for venue reform given in 1962 were not valid then or that their validity has changed now. What has changed is the introduction

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1/ S. Rep. No. 1992, 87th Cong., 2nd Sess. (1962), reprinted in 1962 U.S. Code Cong. & Ad. News 2784, 2785.

of a new class of plaintiffs. In addition to the private individual plaintiffs who were provided relief from District of Columbia venue by the 1962 Act, the 1970's have produced a new industry of plaintiffs in Washington consisting of so-called public interest groups and law firms. The number of conservation and environmental groups having offices in the Washington, D.C. area has grown to more than 145 at the present time. These groups represent national memberships who support the general goals of the groups but whose members to a great extent have no direct interest in, and will feel no direct impact from, the local effects of particular suits.

The public interest groups frequently challenge federal agency actions, or sometimes even work in concert with federal agencies through "friendly" litigation,[2/] which seriously and adversely affects private individual interests. Under present law, these public interest groups, as plaintiffs, choose the forum, frequently the District of Columbia. Once the suit is brought, the individual citizens or organizations, who live, work and are present in the area in which the direct impact of the ligitation will be felt, may move to intervene (assuming they become aware of the distant litigation) but, even if they are allowed to intervene, they cannot move for a change in venue.[3/] Therefore these same local parties who may be the most directly affected by the litigation and who obtained relief in the 1962 Act from District of Columbia venue, are stuck again

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2/ See, Statement of Senator Orrin G. Hatch, Hearing Before Subcommittee on Improvement in Judicial Machinery of the Committee on the Judiciary, United States Senate, 96th Cong., 2d sess. on S. 739 and S. 1472, Ser. No. 96-78, Feb. 20, 1980 at 16.

3/ Trans World Airlines, Inc. v. C.A.B., 339 F.2d 56, (2nd Cir. 1974); Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976).

in the District of Columbia courts the same as they were before 1962.

The proposal in S. 2419 effectively updates the 1962 Venue Act to accommodate the changes in the nature of litigants occurring in the 1970's and allows the same class of private parties who received venue relief in 1962 to receive the same relief in 1982. The reasons which fully justify favorable action on S. 2419 requiring suits to be tried in the judicial district which will be substantially impacted by such suits include the same reasons cited above which justified the passage of the Venue Act of 1962. However, an additional reason for passing S. 2419 has been raised by both opponents and proponents of this legislation.

Your attention will undoubtedly be invited during these hearingsto a perception of the District of Columbia Circuit which has been expressed by at least one representative of environmental groups. This environmental lawyer stated in a law review article that the following strategic reasons are among those which cause environmental lawyers to prefer bringing suits in Washington, D.C.:

1. "The District of Columbia Circuit is by far the most sophisticated and knowledgeable on environmental matters. That Court has written many landmark conservationist opinions." "Few circuits are as understanding of the conservationist cause and of the difficult issues raised in conservation cases as the D.C. Circuit."

2. "Most [environmental cases] arise in very rural areas of the West, while experienced environmental lawyers usually have their offices in coastal cities." "The extra time [and the added expenses] needed to conduct litigation in remote areas also works against environmental lawyers."

3. "Judges and juries in the affected [rural]

areas are likely, therefore [because of new jobs and economic expansion], to feel that the public interest lies in building a project, rather than preserving the environment."

4. "Publicity is an important element in all environmental campaigns. Often the lawsuit is of secondary importance, serving primarily to focus public attention on an issue." "A suit in Washington is certain to receive more extensive coverage by the media than one in the District of Utah, for example."4/

Published statements such as this create a perception among the general public that the D.C. federal courts may have a bias in favor of some environmental or consumer philosophies. This is not healthy for our judicial system. The mere suggestions that litigants have such reasons for selecting a particular forum for certain types of cases tarnishes the public confidence in the objectivity and fairness which our judicial system must constantly protect.

This Committee on the Judiciary and its Subcommittee on Improvements in Judicial Machinery have been considering venue reform legislation since early 1979. After various forms of this legislation have been proposed, discussed and modified as all points of view have been heard, we believe S.2419 is now ready to complete the legislative process.

Thank you for the opportunity for the American Mining Congress to present testimony on this proposed legislation to improve the federal judicial system.

4/ Brecher, Venue in Conservation Cases: A Potential Pitfall for Environmental Lawyers, 2 Ecol. L.Q. 91 (1972).

TESTIMONY OF GEORGE C. FREEMAN, JR.
FOR THE EDISON ELECTRIC INSTITUTE

Introduction

My name is George Clemon Freeman, Jr. I am the senior partner in the Energy and Environmental Law Section of the law firm of Hunton & Williams. I am a member of the District of Columbia and Virginia bars, with offices in both Washington and Richmond. I am appearing before you today on behalf of the Edison Electric Institute to support the enactment of S. 2419.

The Edison Electric Institute is the national trade association of the investor-owned segment of the electric utility industry. EEI's members collectively own a substantial majority of the electric generating capacity in this country and serve most of our citizens in every region, and thus those who live in all the twelve circuits in which our federal courts of appeals are located.

My practice over the past decade has been predominantly before the Environmental Protection Agency, the Nuclear Regulatory Commission (and its predecessor the Atomic Energy Commission) and the various energy regulatory agencies presently congregated in the Department of Energy. It has involved participation in rulemakings, individual licensing and permitting actions and appeals in the courts of appeals for the various circuits and related United States district court litigation. In the mid-1970's I represented electric utility industry participants in four of the five major rulemakings conducted by the Nuclear Regulatory Commission. I have acted as counsel for the Edison Electric Institute and various investor, government and cooperatively owned electric utility industry systems in all of the major EPA rulemakings affecting that industry under the Federal Water Pollution Control Act

since its passage in 1972, as well as all of the major EPA rulemakings under the Clean Air Act affecting the industry since the passage of the 1977 Amendments to that Act. In addition, our firm has acted as counsel for the electric utility, coal and other industries in a number of appellate cases that were ultimately decided by the Supreme Court, and in various proceedings before the Court of Appeals for the District of Columbia, the Second, the Third, the Fourth and the Sixth Circuits that are relevant to the matters before you today. Thus, for more than a decade I have been in the trenches at these key federal agencies dealing with rulemakings directly posing unavoidable trade-offs that are part of national energy and environmental policy and before various U.S. appellate courts to test these rules and the procedures by which they are implemented. I mention these experiences because I think it important that the Committee examine the practical impact of S. 2419.

Summary

From my viewpoint as a lawyer actively involved in federal agency rulemaking proceedings and the appeal of those rules, I believe that S. 2419 is a necessary supplement to S. 1080, the Regulatory Reform Act which was passed by the Senate on March 24, 1982 by a vote of 94 to 0. Taken together, S. 1080 and S. 2419 will result in fairer nationally uniform procedural rules for federal agency rulemaking and fairer nationally uniform rules for the appeal of those agency rules. Whether together with S. 1080 or standing alone, S. 2419 will reverse the insidious trend of the past decade of selective statute-by-statute departures from the rule of national uniformity in agency appeals -- departures that have left appellants who reside or have their places of business in the

various regions of the country with no alternative but to come to Washington hat in hand, solely for the convenience of the lawyers for these specifically preferred federal agencies. Senator Domenici described this trend succinctly in the debates on the 1977 Amendments to the Clean Water Act as one in which Congress, "in bits and pieces" was deciding "that the circuit court system in this country has no validity" and through a "nickel and dime" series of amendments to various organic statutes was achieving the equivalent of "abolishing the jurisdictions of other circuit courts and vesting it in one national circuit court." 4 Legislative History of the Clean Water Act of 1977 (95th Cong., 2d Sess.) at 1023-24. Other Senators, interestingly enough proponents as well as opponents of exclusive jurisdiction, have characterized this trend as a movement toward "centralized" or "consolidated" national judicial decisions in Washington. Compare the remarks of Senators Kennedy, Muskie and Javits on this point with those of Senators Burdick, McClure, Thurmond and Stafford. Id. at 1014, 1017, 1018, 1019, 1025, and 1027, respectively. We share the views of those Senators who regard this recent trend toward mandated, centralized judicial review of agency rules in the circuit court here in Washington as unwise. Thus, we urge you to reverse it across the board through prompt enactment of S. 2419. While we support the bill in its entirety, I will confine my written testimony to a discussion of its provisions dealing with venue in appeals of agency rules to the circuit courts of appeals.

The Relationship of S. 2419 to S. 1080

S. 1080 contains a number of major amendments to the Administrative Procedure Act, 5 U.S.C. §§ 501 et seq. It was introduced by Senator Laxalt and a substantial majority of the

Senate on April 30, 1981. S. 1080 was referred to the Senate Judiciary Committee which held a full day of hearings before Senator Laxalt's Subcommittee on Regulatory Reform on May 14, 1981. I testified there as part of the "practicality panel."

At that time, in my prepared testimony I stated:

> While the Subcommittee is addressing the general subject of which Circuit Court of Appeals is the appropriate forum for appeals from agency rules, I would like to urge you also to take a hard look at the desirability of continuing to permit at least some ten-odd statutes, including the Clean Air Act, to confer exclusive jurisdiction over appeals of their rules of general applicability to the Court of Appeals for the District of Columbia Circuit. The Federal Water Pollution Control Act is conspicuously absent from this list. That omission is deliberate. The 1977 amendments to that act afforded an opportunity for full-fledged debate of the pros and cons of limiting appellate jurisdiction to only one particular court of appeals. At that time Congress, by an almost two-to-one margin, rejected an amendment that would have provided for such exclusive jurisdiction in the District of Columbia Circuit. I submit to you that the arguments of the opponents of that amendment set forth in those debates make a compelling case for the abolition of the remaining pockets of exclusive jurisdiction. At the time you are dealing generally with the two other facets of judicial review of agency rules addressed in the present bill, I urge you to include, either in this committee or on the floor, a provision superseding those special interest jurisidiction provisions that require those who seek justice through appeal of agency rules of general applicability to come to Washington to do so.

S. 1080 was reported out of the Judiciary Committee on November 30, 1981. As reported, S. 1080 included an amendment to § 702 of Title 5 (the judicial review provision of the Administrative Procedure Act) which added a new subsection (c). This subsection would have provided that:

> Notwithstanding any other provision of law, a petition to review an agency rule may be filed in the United States Court of Appeals for the District of Columbia Circuit or for the Circuit in which such person resides or

> in which such person's principal place of business is located.

S. Rep. 97-284, Report of the [Senate] Committee on the Judiciary to Accompany S. 1080, 97th Cong., 1st Sess. (Nov. 30, 1981) at 204. S. 1080 as reported from the Judiciary Committee was subsequently referred to the Senate Governmental Affairs Committee, which reported an amended version of S. 1080 on December 16, 1981. (S. Rep. 97-205). The Governmental Affairs Committee version of S. 1080 eliminated the proposed new subsection (c) to § 702, but gave no reason for this deletion.

A compromise version of S. 1080 was later agreed to in negotiations between representatives of these two Senate committees. The "compromise" version of S. 1080 did not include the proposed amendment to § 702 to add a new subsection (c). To correct this and other deficiencies, Senator DeConcini introduced Amendment No. 1267 on February 10, 1982, which would have restored part of what had been included in the new subsection (c) of 5 U.S.C. § 702 proposed in the Judiciary Committee's version of S. 1080, by amending Section 2112 of Title 28, the general venue provision for federal courts, to add a new subsection (b)(4). The new subsection (b)(4) to 28 U.S.C. § 2112 would permit a person to appeal an agency rule in the court of appeals in which he resides or has his principal place of business notwithstanding any contrary provision in any other statute. Senator DeConcini's discussion of this provision appears at 128 Cong. Rec. S. 759 (February 10, 1982). Unlike the proposed additional subsection (c) to 5 U.S.C. § 702, new subsection (b)(4) of 28 U.S.C. 2112 would not broaden the option to appeal to the Court of Appeals for the District of Columbia if it were not otherwise provided for by other statutes. This amendment was not discussed during the Senate floor debates of S. 1080 on March 18, 22, 23 and 24, 1982. It appeared as S. 2419, which was introduced by Senator

DeConcini on April 21, 1981. See 128 Cong. Rec. S. 3789. That bill is, of course, the bill before you today.

Restoration of the Rule of Uniformity to the Appeal of the Rules of All Federal Agencies

The proposed addition of subsection (b)(4) to 28 U.S.C. § 2112 by S. 2419 restores across the board the basic rule of uniform applicability to all federal agencies in the area of judicial review of agency rules that was intended by the draftsmen of the original Administrative Procedure Act (APA) in 1946. The subsequent creation of statute-by-statute exceptions to the general applicability to all agencies of the provisions of the APA was essentially a phenomenon of the 1970's. This growing trend of special exceptions for certain preferred agencies is contrary to the wishes of the Congress that enacted the original APA in 1946. That earlier Congress made a clear policy choice that the APA would apply across the board to all federal agencies:

> The bill is meant to be operative "across the board" in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. . . . No agency has been favored by special treatment.

H.R. Rep. No. 1980, 79th Cong., 2d Sess. (1946), reprinted in Legislative History of the Administrative Procedure Act, 79th Cong., 2d Sess., at 235, 250 (1946).

The reason given for this across the board approach was that:

> The bill is an outline of minimum essential rights and procedures. . . . It affords private parties a means of knowing what their rights are and how they may protect them, while administrators are given a simple framework upon which to base such operations. . . .

Id.

In general, these statutes enacted in the 1970's that

contain their own judicial review provisions conferring exclusive jurisdiction on the D.C. Circuit follow the pattern of the first sentence of section 307(b)(1) of the Clean Air Act:

> A petition for review of action of the Administrator in promulgating [list of specific actions]. . .or any other nationally applicable regulations promulgated, or final action taken by the Administrator under this Act may be filed only in the United States Court of Appeals for the District of Columbia.

This provision, and its equivalent in other statutes, is usually accompanied by a provision similar to § 307(e) of the Clean Air Act:

> Nothing in this Act shall be construed to authorize judicial review of regulations or orders of the Administrator of this Act except as provided in this section.

S. 2419 restores the rule of uniformity for appellate review of the rules of all agencies that are directly appealable to the circuit courts. Amended section 2112 of Title 28 would allow any petitioner to appeal in the court of appeals for the circuit in which he resides or has his principal place of business or, but only where a specific statute expressly provides with regards to agency rules promulgated under it, in the D.C. Circuit. S. 2419 thus makes it possible for petitioners who wish to seek review of agency rules within their home circuit to do so regardless of the limitations written earlier into other statutes. At the same time, by superseding these earlier "exclusive" jurisdiction provisions, it will also erase the shadow cast over our other eleven United States courts of appeals by the patch-work of recent legislation insidiously elevating the Court of Appeals for the District of Columbia Circuit above its peers.

Let me say a few words about the practical importance of dealing with the problem created by this plethora of growing

exceptions through the generic remedy of a single across-the-statutes provision in S. 2419, rather than dealing with it piecemeal in the episodic review or reauthorization of the dozen or so statutes set forth in Appendix A. The reason is quite simple: unless the problem is solved generically, the rule of uniformity will never be restored in what remains of this century.

When statutes like the Clean Air Act or the Clean Water Act come up for review the principal focus of Congress, the Administration and the public is on their substantive provisons. If you look at the recent and ongoing review of the Clean Air Act in the Senate Environment and Public Works Committee and its equivalent committee in the House, it becomes clear that virtually all of their attention to date has been given to substantive issues: e.g., prevention of significant deterioration, non-attainment, auto emission limitations, acid rain, and new source performance standards, to mention a few. Almost no attention has been given to procedural matters. For example, on the day I and others testified before that Senate Committee's Oversight Hearing on Enforcement of the Clean Air Act, (June 4, 1981), only two senators were present. On reflection, this is not surprising. The subjects discussed that day -- criminal and civil sanctions and administrative procedures -- are matters within the primary jurisdiction of this committee, the Committee on the Judiciary. They are only secondarily related to the environment or to public works.

This brings me to an argument I heard while S. 1080 was winding its course through this Committee and the Governmental Affairs Committee to the Senate floor -- an argument you will undoubtedly also hear with regard S. 2419. It is that the "no

other statute withstanding" clause in S. 2419 encroaches on the jurisdiction of other Senate Committees which have primary jurisdiction over the subject matter of the statutes listed in Appendix A. The answer to this "its my turf" argument is plain: when creating exceptions to the judicial review provisions of the Administrative Procedure Act in the past, as well as creating criminal sanctions, those committees were dealing with generic matters indisputably within the primary jurisdiction of this committee. You undoubtedly could have asked for joint refusal of the earlier bills, and, indeed, could do so in the future if they are amended. So, with regard to S. 2419, as with S. 1080, this committee is simply reasserting its primary jurisdiction over matters directly related to the federal judiciary.

Analysis of the Arguments

Let us turn to the specific arguments that have been raised to justify conferring exclusive jurisdiction for review of agency rules on the D.C. Circuit and see if they withstand serious scrutiny.

1. Duplicative Appeals - It is sometimes argued that exclusive jurisdiction is necessary to prevent conflicts among the circuits that could paralyze national regulatory programs. This argument fails for two reasons.

The first reason is that many statutes, like the Clean Air Act which provides for exclusive jurisdiction in the D.C. Circuit, and others like the Clean Water Act which permits appeals to any of the circuits, require that agency rules be appealed within 60 (or sometimes 90) days and forbid collateral review of a rule in subsequent enforcement actions. See, e.g.,

§ 307(b) of the Clean Air Act and § 509(b) of the Clean Water Act.[1/]

These 60 or 90 day "appeal or perish" provisions, which virtually all the post-1970 environmental and energy statutes contain, mean that when final rules of general applicability are promulgated under the statute, those rules are almost always immediately appealed by the industry as a whole, by individual companies within that industry or by environmental groups. Multiple appeals are invariably consolidated into a single appellate proceeding. This is true whether or not exclusive D.C. jurisdiction exists. The only substantive effect of an exclusive jurisdiction provision is that it makes certain the consolidation of multiple appeals will always occur in the Court of Appeals for the District of Columbia. Where such a provision is not in the organic statute the consolidation may occur in any circuit.

Thus, regardless of how the circuit for consolidation is chosen or whether exclusive jurisdiction exists, it is clear that as a practical matter where the 60 or 90 day "appeal or perish" provision occurs, the particular set of rules being challenged on appeal will be the subject of a single unified appellate review. As two examples, I cite first Appalachian

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1/ The unfairness of such provisions and their possible unconstitutionality has been noted by Justice Powell in his concurrence in Adamo Wrecking Co. v. U.S., 434 U.S. 275, 289 (1978). In my testimony last year before Senator Laxalt's Subcommittee on S. 1080, I pointed out that these 60 or 90 day "appeal or perish" provisions require regulated industries to try to anticipate the general rule's applicability to every company regulated under all possible future circumstances. See also Appalachian Power v. EPA, 477 F.2d 495, 503 (4th Cir.) (1973). In any subsequent enforcement action against an individual by the government, often years later, that individual has all the disadvantages of hindsight and no recourse to justice. At that time I also pointed out that these formidable odds against the citizen are further increased by affording the agency's rule a "presumption of validity" in the mandated "one shot" appeal -- a problem solved by S. 1080 if it ultimately becomes law.

Power v. Train, 545 F.2d 1351, modified, 545 F.2d 1380 (4th Cir. 1976), where appeals filed in 10 circuits were consolidated in the Fourth Circuit. That case involved a challenge to EPA's regulations under the Clean Water Act establishing effluent limitation regulations for steam electric generating plants. A second example is the multi-industry appeals of EPA's Consolidated Permit regulations which were promulgated under the Clean Air Act, the Clean Water Act and the Resource Recovery and Conservation Act. Petitions were filed in the Fourth, Fifth and D.C. Circuits and consolidated in the D.C. Circuit.

Under either statutory regime only one circuit court will rule on the validity of the particular set of agency rules. And that circuit's decision has binding nationwide effect, unless or until the Supreme Court grants certiorari and rules otherwise.

The second answer to the duplicative appeals argument in support of exclusive jurisdiction is that even where the 60 or 90 day "appeal or perish" provision does not appear in the organic statute, the argument for conferring exclusive jurisdiction on the D.C. Court of Appeals for greater uniformity does not withstand serious scrutiny. Taken to its logical conclusion, this argument would require that all regulatory cases under the particular act be subject to review in only one circuit. If not, "here always would be a risk of conflict between the circuits in the interpretation of the statute or the agency's rules under it. Questions of interpretation are not restricted to initial, generic appeals of the agency's rules. They also arise long afterwards when rules that survive such appeals are applied in individual licensing cases. A substantial proportion of regulatory actions have long been reviewable in any of the circuits and

there is no no evidence of debilitating conflict. When important conflicts arise, the Supreme Court exists to resolve them. Indeed, one of the primary criteria used by the Supreme Court in deciding whether to grant certiorari is whether a decision has created a conflict among courts of appeals. See Supreme Court Rule 17.1(a).

A number of distinguished judges and commentators have observed that multi-circuit review is one of the most desirable benefits of a nationwide system of federal courts. It permits issues to be reviewed from different perspectives by many learned judges and illuminates diverse views that assist the Supreme Court in ultimately resolving the issue. Justice Stevens has lauded "the wisdom of allowing difficult issues to mature through full consideration by the court of appeals." E.I. duPont de Nemours v. Train, 430 U.S. 112, 135 n. 26 (1977). See also Leventhal, A Modest Proposal for a Multi-Circuit Court of Appeals, 24 Am.U.L.Rev. 881, 908 (1975); Currie & Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum.L.Rev. 1, 68-70 (1975). Dispersion of jurisdiction among several courts has the additional benefit of reducing the potential of a single wrong decision which could harm an administrative program or those subject to it. The more important the administrative program, the greater the danger of giving sole power over it to a single court. As I discuss later in my testimony, one of the problems with restricting jurisdiction to a single court is that after a period of time an entire court or its majority may come to embrace a particular point of view that may be tilted philosophically for or against a particular federal agency or a particular industry.

2. Races to the Courthouse - Proponents of exclusive jurisdiction argue that providing alternative appellate forums

results in an unseemly "race to the courthouse" and in "forum shopping" by petitioners for a sympathetic court. This problem is best solved by changing the present "first in time" rule, which establishes ultimate jurisdiction for review in the first court in which a review petition was filed, to a rule in which the ultimate jurisdiction would either be (1) randomly selected from the pool of circuits in which multiple petitions are filed, as proposed by S. 1080 and in S. 2419, or (2) in the circuit in which the rule will have the greatest impact. I believe the former is more practical than the latter since most agency rules of national scope will have different impacts in different sections of the country but all of them will be significant and difficult to quantify.

"Forum shopping" by petitioners can be reasonably limited by allowing them to file only in either the circuit in which they reside or have their principal place of business or in the D.C. Circuit, but the latter only where the organic act specifically so provides. I should add, however, that "forum shopping" has not traditionally been regarded as inherently evil in our judicial system. Its roots are ancient and respectable. Long before the Revolution our English forebearers often had a choice between law and equity. Our present federal diversity jurisdiction presents a smorgaboard for "forum shoppers." But, if there are those who still maintain that forum shopping is somewhat tainted, then it should be pointed out that a statute conferring exclusive jurisidction on the Court of Appeals for the District of Columbia Circuit is the quintessence of forum shopping by the federal government, who buys out the D.C. store for the preferred federal agency at the expense and inconvenience of our citizens.

3. Special Expertise - Another argument advanced by

proponents of exclusive jurisdiction is that most judges of the D.C. Circuit have some "special expertise" or "competence" in the field of adminstrative law that judges on other circuit courts somehow lack. This is not true in fact and, even if true, would be an undesirable state of affairs.

First, few if any circuit judges, wherever they sit, could in fact become an "expert" on the countless matters subject to federal regulations. Second, the number of federal regulations has grown so large in the past fifteen years that whatever truth the suggestion of expertise may have had in the past has now vanished. Virtually all federal judges have been required to review federal regulations of one type or another under statutes that do not restrict jurisdiction to the D.C. Circuit. To the extent that the D.C. Circuit may be more familiar with administrative review actions, this familiarity is the result of past and current venue statues that have forced many administrative cases into the D.C. Circuit. However, judges in other circuits who review regulatory actions under statutes with non-exclusive venue provisions have proven to be no less competent than the judges on the D.C. Circuit. This is highlighted by comparing the experiences under the Clean Air Act and Clean Water Act, which closely parallel each other except that review under the Clean Air Act is restricted to the D.C. Circuit. Administrative review of EPA actions taken under the Clean Water Act has been as competent and expert and has functioned as smoothly -- if not more smoothly -- than review of EPA actions taken under the Clean Air Act.

Senators Thurmond, Randolph and McClure effectively countered this allegation of "special expertise" during the floor debates on the 1977 Clean Water Act amendments, cited earlier. Senator Thurmond stated:

> I do not concede that the judges here [D.C.] have any monopoly on brains, on character, on dedication, or on courage. I do not know why the judges here can decide cases any better than they can in Richmond, Va. or the fourth circuit court of appeals, the circuit in which I live, which has jurisdiction of my State of South Carolina.

4 Legislative History of the Clean Water Act of 1977, supra, at 1024-25.

Senator Randolph said:

> I think one of the strengths of America has always been our diversity. . . . [T]his diversity of which I have spoken. . . .means to me we should not attempt to prejudge decisions or limit the opportunities for the presentation of varying viewpoints. We have. . .11 [eleven] circuit courts in the United States of America. Each of those units of our court system has a competency to act on the issues, very frankly important issues, that we are discussing in this Chamber today.

Id., at 1026.

Senator McClure was more blunt:

> It has been suggested that this [D.C.] court alone has the expertise. What absolute sophistry. Expertise? Is it to be said that the other circuits of the United States lack expertise? Is it to be said that the other circuit judges are not competent, that they are not capable of dealing with these problems of such great magnitude, of such great and national scope and magnitude? What nonsense.

Id., at 1025.

It should also be noted that the D.C. Circuit is overburdened with reviewing actions restricted to its jurisdiction. Dispersal of these suits among the circuit courts would speed up decision-making, which is presently hampered by the great backlog of administrative suits in the D.C. Circuit, e.g., in American Petroleum Institute v. Costle, (No. 79-1104), involving petitions for review of EPA's ambient air standard quality for ozone, the case was filed in January, 1979, and was not decided until September, 1981, more than eighteen months after the court heard oral argument.

To the extent that a rule will have a substantial impact on a particular area of the country, there is a strong argument to be made that a judge in the local circuit may have a better understanding of local concerns -- and therefore a special competence and expertise to review the agency action in light of those concerns. The local system of federal courts is an expression of the preference for having issues with a substantial local impact decided in a local court. See Gulf Oil v. Gilbert, 330 U.S. 501, 509 (1947).

More important, we do not want or need judges to be true technical "experts" on the substantive, factual matters which are regulated by the federal government. On judicial review of a rulemaking, the role of the judge is to determine whether an agency properly has applied the law and whether the agency's factual and policy conclusions are adequately supported by the record. 5 U.S.C. § 706. The judge is not to sit as a technical "expert" to decide what he or she would have done had he been the regulatory officer. See International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973) (Leventhal, J.). It is a basic tenet of our federal judicial system that all circuit judges are both impartial and competent to hear any case and address any legal issue.

Restricting administrative review can also result in a loss of "general perspective" by judges on the overburdened reviewing court whose time and energy to hear other cases becomes limited; there is a complimentary loss of the advantage of an "outsider's," or other circuit's, unprejudiced vision. The alleged expertise of the judges on the reviewing court may merely be the reapplication of preconceptions fostered by many years of dealing with similar issues. See Currie & Goodman, supra. at 69. Such a "bias" on administrative issues may lead to a consistently applied consensus that is not representative,

or to the substitution of judicial judgment for agency expertise. This not only duplicates the agency's role, but can frustrate the flexibility valued in our administrative system. See President, Acting through the Attorney General, Report on Feasibility of Establishing an Environmental Court System at VI-24 (1973). See also Hines and Nathanson, Preliminary Analysis of Environment Court Proposal Suggested in the Federal Water Pollution Control Act Amendments of 1972 in id., at C-13.

4. Convenience of the parties - Finally, another argument sometimes advanced to justify conferring exclusive jurisdiction for the review of agency rules on the Court of Appeals for the District of Columbia Circuit is the "convenience of the parties." Not surprisingly, in the debate on the 1977 amendments to the Clean Water Act this argument was made by the Justice Department and the Environmental Protection Agency to support an amendment to include an exclusive jurisdiction provision in that act comparable to the one in the Clean Air Act. In the floor debates, Senator Domenici succinctly rebutted this argument:

> Make no bones about it. All we are doing here is saying that people do not like how the circuit courts have ruled on matters of national interest. So we are saying "Let's bring it all here to Washington, where it is nice and convenient." For whom? For the Federal Government.
>
> What have the people of America been saying? They do not want to accomodate the Federal Government. They want to be accommodated for a change. These cases should be heard in [all] the circuit courts. The ultimate decider is the Supreme Court.

4 Legislative History of the Clean Water Act of 1977, supra. History also reflects that the Judiciary Act of 1789 and the Mandamus and Venue Act of 1962 established a system of local federal courts throughout the nation in the belief that they

would be readily available to individuals seeking redress against the government.

Conclusion

It is therefore clear that restricting review of administrative actions to the D.C. Circuit is an inadequate solution to any of the present problems with the system of review. There are alternative solutions which not only preserve the values inherent in a diverse and competent system of circuit courts but which recognize the need for a decentralized governmental and judicial system responsive to local concerns.

APPENDIX A

REVIEW OF ADMINISTRATIVE ACTIONS UNDER SELECTED FEDERAL STATUTES

I. STATUTORY PROVISIONS GRANTING EXCLUSIVE JURISDICTION TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

A. Environmental Acts

1. Noise Control Act, 42 U.S.C. § 4915 (standards, regulations, labelling)

2. Submerged Lands Act - Outer Continental Shelf Land Subchapter, 43 U.S.C. § 1349 (approval of leasing programs)

3. Resource Conservation and Recovery Act, 42 U.S.C. § 6976

4. Safe Drinking Water Act, 42 U.S.C. § 300j - 7(a)(1) (certain federal and state standards)

5. Clean Air Act, 42 U.S.C. § 7607(b)

B. Energy Acts

1. Energy Policy and Conservation Act, 42 U.S.C. § 6384 (action to set aside certain orders issued by the Comptroller General)

II. STATUTORY PROVISIONS GRANTING PETITIONERS THE OPTION OF SEEKING REVIEW IN THE D.C. CIRCUIT, BUT NOT GRANTING EXCLUSIVE JURISDICTION

A. Environmental

1. Toxic Substances Control Act, 15 U.S.C. §§ 2615, 2618

2. Occupational Safety and Health Act 29 U.S.C. § 660

3. Safe Drinking Water Act, 42 U.S.C. § 300j - 7(a)(2) (any other regulations or determination)

B. Energy

1. Natural Gas Act, 15 U.S.C. § 717(r)

2. Natural Gas Policy Act, 15 U.S.C. § 3416

3. Fuel Use Act, 42 U.S.C. § 8412

4. Natural Gas Pipeline Safety Act, 49 U.S.C. § 1675(a)

5. Energy Conservation and Production Act 15 U.S.C. § 6869

C. Miscellaneous

1. Black Lung Benefits Reform Act, 30 U.S.C. § 931

2. Federal Mine Safety and Health Act, 30 U.S.C. § 811

3. Independent Safety Board Act, 49 U.S.C. § 1903

4. Securities and Exchange Commission, 15 U.S.C. §§ 77i, 78y

5. Consumer Product Safety Act, 15 U.S.C §§ 2060(a), 2061(e)

III. STATUTORY PROVISIONS LIMITING REVIEW TO DISTRICT COURTS OR COURTS OF APPEAL IN CIRCUITS WHERE SOME NEXUS TO PETITION EXISTS

A. Environmental

1. Federal Environmental Pesticide Control Act, 7 U.S.C. § 136n (a)-(c)

2. Surface Mining Act, 30 U.S.C. § 1276

3. Endangered Species Act, 16 U.S.C. §§ 1540(c) (district court), 1536(n) (circuit courts; D.C. Circuit only if agency action occurred outside all circuits)

B. Energy

1. Energy Policy and Conservation Act, 42 U.S.C. § 6393 (certain actions) (jurisdiction governed by 12 U.S.C. § 1904)

2. Public Utility Regulatory Policy Act, 16 U.S.C. § 2633

3. Federal Power Act, 16 U.S.C. § 825L

4. Department of Energy Act, 42 U.S.C. § 7192

95-700 O—82——11

APPENDIX

ALLIANCE FOR JUSTICE
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 624-8390

October 14, 1981

Honorable Paul Laxalt
United States Senate
Washington, D.C. 20510

Honorable William V. Roth
United States Senate
Washington, D.C. 20510

Dear Senators Laxalt and Roth:

The Alliance for Justice, on behalf of the undersigned groups, is writing to express its strong opposition to the pending proposal to limit venue in the District of Columbia federal courts in cases against federal defendants. We are particularly concerned that it may be offered as a floor amendment to regulatory reform legislation without any prior opportunity for public discussion or committee consideration.

This proposal seeks to radically change current law, now based on a flexible standard keyed to the interests of justice and the convenience of the parties. It would severely limit the use of the District Court for the District of Columbia as a forum for suits brought against federal government agencies and officials. Yet, often the District of Columbia is the most suitable forum -- precisely because the government's decision-makers, records and lawyers are most accessible there. In addition, the District of Columbia may be the only forum where plaintiffs from several states who are challenging the same federal action can join together in a single lawsuit. The alternatives are either a wasteful multiplicity of litigation or a resort to cumbersome class actions. Neither option serves the interests of justice or of the parties.

No showing whatsoever has been made that 28 U.S.C. §1391(e), the section governing venue in cases against federal defendants, has been abused or is in need of reform. The vast majority of cases against the United States are, in fact, litigated in forums other than Washington, D.C. The Administrative Office of the United States Courts reports that for the period July 1, 1980 through June 31, 1981, only 1,627 -- or 6.7% -- of the 24,247 district court filings against federal defendants were brought in the District of Columbia. Further, there are ample statutory provisions governing the transfer of cases, and they are routinely used in cases of local impact.

Our final concern goes to the actual language of the proposal. We believe that procedural legislation should be clearly drafted so that litigation proceeds as efficiently and economically as possible. This proposal, however, is vague and confusing. For example, what does "directly affect" mean? Does "resident" include only individuals or does it extend to corporations or government agencies? If there is to be legislation, it should be carefully drafted to solve these and related problems. At the very least, a thorough hearing record and

committee report are necessary to guide courts and litigants through what is certain to be extended litigation over the meaning of the legislation.

In conclusion, we restate our opposition to alteration of the current venue scheme. It will undoubtably lead parties to engage in expensive and time-consuming threshold litigation which will, in turn, burden the already overcrowded federal courts. If you still choose to go forward with such a proposal, we urge you to subject it to the usual legislative process.

We appreciate your consideration of our views.

Sincerely,

Nan Aron

Nan Aron

The following organizations join in support of this letter:

Access to Justice Project
American Civil Liberties Union
American Coalition of Citizens with Disabilities
AFL-CIO
AFSCME
Center for Law and Social Policy
Center for National Policy Review
Congress Watch
Consumers Union
Defenders of Wildlife
Environmental Defense Fund
Equal Justice Foundation
Institute for Public Representation
Mental Health Law Project
Mexican American Legal Defense and Educational Fund
National Audubon Society
National Wildlife Federation
National Women's Law Center
Native American Rights Fund
Sierra Club Legal Defense Fund
Washington Council of Lawyers

cc: Honorable Patrick J. Leahy
Honorable Thomas F. Eagleton

OFFICES OF
THE ATTORNEY GENERAL
ONE SOUTH CALVERT STREET
BALTIMORE, MARYLAND 21202

STEPHEN H. SACHS
ATTORNEY GENERAL

November 3, 1981

The Honorable Charles McC. Mathias, Jr.
358 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Mathias:

I understand that Senator Simpson intends to offer a floor amendment to the Regulatory Reform Bill, S.1080, the effect of which would deny Maryland an important choice of venue pursuant to 28 U.S.C. §1391. I am writing because of my concern that passage of such a provision would significantly impair Maryland's enforcement of the rights of our citizens.

Should this amendment pass, Maryland would no longer be able to choose to bring suit against the federal government in the D.C. federal district court in any case where the relief sought would "directly affect" the residents of Maryland. Because the judges of that court are experts in administrative law, we have often chosen that court as the forum to resolve disputes involving federal agencies. A denial of this choice is inimical to the efficient administration of justice.

The D.C. federal district court is often the most convenient forum in which to bring suit. Access to sources of proof such as administrative records are usually within that jurisdiction. Witnesses, such as government officials who promulgated regulations at issue, experts relied on

by those officials, and the custodians of records, are more often than not within that jurisdiction. For these reasons, Maryland has chosen to bring suit in that forum. See, for instance, Batterton v. Marshall, 648 F.2d 694 (D.C. Cir. 1980); Maryland v. Mathews, 415 F.Supp. 1206 (D.D.C. 1976).

Third, the proposed amendment is imprecise and ambiguous. As drafted, it offers virtually no guidance to the courts for its implementation. It is foreseeable that we would have to spend our scarce resources litigating proper forums, defining this provision's terms, and appealing adverse decisions. This, too, is inimical to the efficient administration of justice.

I also believe that this amendment is in reality a thinly veiled attempt by some states and business interests to lessen the impact of federal health, safety and environmental regulations on them. As such, it is of a piece with a growing and disquieting tendency to bring about substantive policy change by attacks on form and process, attacks which have far-reaching and dangerous effects because they change "the rules of the game". The proponents of this amendment should challenge the policies with which they disagree directly by addressing the substantive issues and not by changing procedural rules.

I am also concerned by the apparent manner by which this change is being sought. I understand that Senator Simpson and others expect to create legislative history for this amendment through their remarks during the floor debate and by written submissions to the Congressional Record. An amendment to an unrelated bill coupled with legislative history created on the floor seems to me to be an inappropriate method of changing the rules of federal civil procedure.

I urge you to take an active role in opposing this amendment and S.1107, which similarly amends 28 U.S.C. §1391.

Sincerely,

Stephen H. Sachs

SHS/bw

ARTHUR J. GOLDBERG

March 15, 1982

The Honorable Patrick Leahy
The United States Senate
Washington, D. C. 20510

My dear Senator Leahy:

I write to join those who have written in opposition to the opposed amendment to 28 U.S.C. Sec. 1391 (e).

It is my considered view that this amendment is both unnecessary and ill conceived.

The present venue provisions in our federal judicial code are neutral in character. These venue provisions have not been abused by undue and unwarranted recourse to the federal courts of the District of Columbia.

In my experience it is not established by the evidence that environmental and other groups are taking advantage of the provisions of the present law by resorting to the District of Columbia courts on the illusory hope that they are more liberal than local District Courts elsewhere.

Both as a Justice of the Supreme Court and since departing therefrom, I have followed the decisions of the Federal Courts in the District of Columbia. I do not find them in environmental and other matters to be significantly different from the decisions of other Federal Courts.

Further, it is to be recalled that the decisions of the Courts of the District of Columbia are subject to review by the United States Supreme Court. Also, the present law contains appropriate provisions for the transfer of cases to local districts, upon motion of either an intervenor or the government itself.

In sum, no case can be made, based on the evidence, for the proposed amendments.

I am sure you will agree with me that tampering with the venue provisions of the federal judicial code should not be allowed unless there is a compelling necessity to do so.

I do not find, on the basis of my experience, any showing of such compelling necessity.

Sincerely yours,

Arthur J. Goldberg

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LYNN L. BERGESON
BRUCE G. JOSEPH
WILLIAM S. LIETH
VERN R. WALKER

March 15, 1982

The Honorable Patrick J. Leahy
United States Senate
427 Russell Senate Office Building
Washington, D. C. 20510

Dear Senator Leahy:

As counsel to Defenders of Wildlife, I asked the Honorable Abe Fortas, former Associate Justice of the Supreme Court of the United States, for his reaction to the proposed amendment to 28 U.S.C. § 1391(e). As you know, this amendment, if enacted, would require suits against public officials to be brought in the district court where the residents will be directly affected by the relief sought. In environmental litigation, this amendment would have the effect of restricting the D. C. Circuit as a forum for suits against federal government agencies and officials, which is, of course, its purpose.

Mr. Fortas, after thoughtfully studying the matter, called the proposed amendment "[a] form of judicial gerrymandering." I am passing on to you his succinctly-stated views as the press of law practice prevents him from doing so personally.

Sincerely yours,

Cathleen H. Douglas

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
1111 EAST 60TH STREET
CHICAGO • ILLINOIS 60637

May 10, 1982

Sen. Patrick J. Leahy
427 Russell Senate Office
Building
Washington, D.C. 20510

Dear Sen. Leahy:

At the request of a member of the Judiciary Committee staff, I am enclosing for your consideration a copy of an article I recently wrote on the subject of the venue bill now pending before your committee. As I am unable to testify in person, perhaps you may wish to insert the article in the record as an expression of my views. As you will see, one of my concerns is that any attempt tc localize lawsuits in the district principally affected seems likely to create serious ambiguities that will provoke expensive and unnecessary threshold litigation.

Sincerely,

David P. Currie

David P. Currie
Harry N. Wyatt Professor
of Law

DPC/mmg

1050 THOMAS JEFFERSON STREET, N. W.
SIXTH FLOOR
WASHINGTON, D. C. 20007
TELEPHONE (202) 333-8500

May 12, 1982

Honorable Patrick J. Leahy
United States Senate
427 Russell Senate Office Building
Washington, D. C. 20510

Re: Venue Legislation

Dear Senator Leahy:

I am writing to you and the Committee in my own behalf as a private citizen and member of the bar of California and the District of Columbia.

My principal concern in opposing the venue legislation now before the Committee is that this legislation is simply unnecessary and will as a practical matter unnecessarily restrict parties' rights to bring and maintain actions in our federal courts. In my experience, the present venue system works very well; indeed, our federal judges are quick to transfer cases which do not belong before them. I add in this regard that I principally represent private companies and associations in actions against the federal government and its officials, and I have never felt or been restricted by the present venue system.

I also happen to be the lawyer who handled, and am still handling, the so-called Ruby Lake litigation which is used as an example of why we need this legislation.

As a lawyer, and an ardent believer in the strength of an independent judiciary, I believe you and the Committee should be aware of the true facts of the Ruby Lake case.

First, the Ruby Lake case is still being litigated. It is not being litigated in Washington, D. C., it is being litigated in Reno, Nevada. Aspects of the case were tried in Washington when the issues before the Court were national issues of administrative law and procedure. When local issues became involved, the case was heard in Nevada. I think the facts speak for themselves: In the very case the proponents of the legislation use as an example of "shortcomings in the present system," the present system has achieved the very result the proponents of the measure seek.

Second, the facts of the Ruby Lake litigation are very different from what is often heard from supporters of the venue legislation. (When I use the term "facts", I mean facts that were determined by a federal judge after trial in which the State of Nevada, represented by its Attorney General and two Deputy Attorneys General, participated, and several Nevada witnesses testified.)

Among the important facts you and the Committee should be aware of are the following:

** Ruby Lake is a National Wildlife Refuge. It was established in 1938 by President Franklin Roosevelt as an "inviolate sanctuary for migratory birds." It is not, and never has been a recreational area. Moreover, it is not a lake; it is a marsh.

** Certain types of recreational boating at Ruby Lake are now, and have always been, strictly prohibited by federal statutes and regulations. It was only when the Secretary of Interior sought, in 1978, to violate federal law by permitting unlimited horsepower motorboating on wildlife refuges during the duck breeding season that any controversy arose over the Refuge.

** Other types of recreational boating are in fact permitted now at the Ruby Refuge, as long as the boating activities are consistent with the Ruby Refuge's dedication as a migratory waterfowl refuge.

** Defenders of Wildlife never sought to ban all boating at Ruby Lake. It supported then, and supports now, recreational boating which is compatible with waterfowl breeding and nesting activities.

** Nevada citizens joined with Defenders of Wildlife in its court actions to prevent destruction of this important national resource by the motorboating and waterskiing that the Secretary of Interior attempted to permit, in violation of federal law, in 1978.

I have provided the Committee with documentation of these and additional facts regarding Ruby Lake, including copies of the court decisions in the first two Ruby Lake cases (the third is still pending, and is in fact set for oral argument in Nevada next Friday). I would be happy to provide further information to you and the Committee, if it would be helpful.

Very truly yours,

Paul A. Zevnik

Enclosures

In terms of documentation, I have enclosed the following:

* A. A photograph of Ruby Marsh, which reveals that the area is in fact a duck refuge.

* B. A photograph of the kind of huge boats, exceeding 200 horsepower, that were involved in the litigation. This photograph shows such a boat on Ruby Lake in violation of the court's order in 1978. These photographs were used as evidence in the first two Ruby Lake cases.

C. A Fact Sheet I prepared on the Ruby Lake cases.

D. Copies of the opinions of the Judge in the first two Ruby Lake cases. As you can see, they involved detailed and careful analysis of fact and law, representing careful judicial scholarship.

* E. A copy of my recent brief in the now-pending Ruby Lake case in Nevada. The brief sets forth an accurate statement of the litigation. It was submitted to the Ninth Circuit after the State of Nevada refused to let Defenders of Wildlife participate in the Ruby Lake case in Nevada. We prevailed at the Ninth Circuit and are now in the case. However, the refusal by the State to let Defenders of Wildlife into the litigation in the local area says a lot about their motivation in this case, as well as their motiviation in seeking this legislation.

* NOT PRINTED IN HEARING RECORD

FACT SHEET

The Ruby Marsh Case

I.

Claim by the Venue Bill's Supporters:

"The people most affected by the case were denied participation."

THE FACTS:

* * More Nevada residents testified at the Ruby Lake trial than anyone else; 6 out of the 8 witnesses were in fact present or former local residents.

* * The State of Nevada was a party to the case. The State intervened -- without opposition -- 2 working days after the complaint was filed.

* * The State was represented in the litigation by Nevada Attorney General Robert List and two assistants. Governor List argued the case on behalf of the State.

* * Further, prior to the lawsuit, public hearings were held in Nevada regarding Ruby Marsh.

* * The State and its agencies also participated fully in the agency proceeding leading up to the lawsuit, and was aware of all that had transpired in Washington.

II.

Claim by the Venue Bill's Supporters:

"The court that rendered judgment knew nothing about local conditions."

THE FACTS:

* * The court heard abundant testimony about local conditions.

* * The court received into evidence many photographs, such as the attached, which showed the area as fully as required in any such lawsuit.

* * The court was fully familiar with local conditions and problems.

* * The Nevada court that supposedly "should have had" the Ruby Marsh case is located

300 miles away from Ruby Marsh, over dirt roads through the desert.

III.

Claim by the Venue Bill's Supporters:

"The State was not notified of the hearing on the Temporary Restraining Order."

THE FACTS:

* * Under Rule 65 of the Federal Rules of Civil Procedure, notice is not required before a hearing on a Temporary Restraining Order. This is just as true in Nevada as in Washington, D. C.

* * The State was in fact represented at the TRO hearing by a Justice Department attorney.

* * The State was personally notified of the lawsuit through its Washington counsel.

* * The state was in fact fully aware that a complaint had been filed prior to the TRO hearing.

IV.

Claim by the Venue Bill's Supporters:

"The plaintiff's attorneys are 'legal lochinvars' who used unscrupulous tactics in the litigation."

THE FACTS:

* * The plaintiff in the case was represented throughout by Covington & Burling, this city's largest and most respected law firm.

* * The "legal lochinvar" who argued the "infamous" TRO motion was Roberts B. Owen, a partner at Covington & Burling.

* * Roberts B. Owen is a distinguished lawyer and a former Legal Advisor to the State Department, who assisted Warren Christopher in negotiating the solution to the Iranian crisis.

* * Roberts B. Owen is a distinguished American of the highest ability and ethical standards. He is not a "legal lochinvar".

V.

Claim by the Venue Bill's Supporters:

"Ruby Marsh is the only local boating area."

THE FACTS:

* * Ruby Marsh is not a boating area. It is a federally-owned duck sanctuary.

* * Ruby Marsh is an exceptional wildlife area. It has been a National Wildlife Refuge since 1938.

* * Ruby Marsh is 4 feet deep. It is not a lake. It is not suitable for boating.

* * Boating is strictly prohibited by federal law on all National Wildlife Refuges.

* * There are several publicly-owned power-boating recreational lakes in Nevada within a few miles of Ruby Lake, all of which are more suitable than Ruby Marsh for boating: Wildhorse Reservoir (3,200 acres); Wilson Reservoir (825 acres); Cummins Lake (400 acres); Cave Lake, Illipah Lake and the Kirch Wildlife Management Area. Also, three large new boating areas for the area are either proposed or under construction: Hylton Reservoir, Devil Gate Reservoir and Vista Reservoir.

VI.

Claim by the Venue Bill's Supporters:

"The case was purely local and should have been tried in Nevada."

THE FACTS:

* * The sole issue before the District of Columbia court was an issue of law, not local fact-finding.

* * The court and parties recognized that the question before them was the legal power of the Secretary of Interior: whether the Secretary had complied with the Refuge Recreation Act in assembling his administrative record and promulgating the rule.

* * Some aspects of the Ruby Marsh case are still being litigated -- in Nevada.

* * The case is now being litigated in Nevada solely because the issues presently before the court are local. The former cases belonged in Washington and the current one belongs in Nevada.

* * The present venue system -- even in the "infamous" Ruby Marsh case -- works perfectly, and <u>just</u> as it should.

* * The bill's backers are improperly seeking to change the entire venue system because they lost the earlier Ruby Marsh cases.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 78-1210
)
CECIL D. ANDRUS et al.,)
)
Defendants.)

FILED
JUL 14 1978
JAMES F. DAVEY, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The complaint in this action was filed June 29, 1978, seeking a declaratory judgment that special regulations of the United States Fish and Wildlife Service permitting recreational boating within the Ruby Lake National Wildlife Refuge [the "Refuge"] violate the Refuge Recreation Act of 1962 (16 U.S.C. § 460k) [the "Refuge Recreation Act"]. The complaint also seeks a preliminary and permanent injunction against opening the Refuge to use by motorboats and requests that the Court retain continuing jurisdiction of the action. On June 29, 1978, the Court granted plaintiffs' motion for a temporary restraining order and, by agreement of the parties, set the matter for a consolidated hearing on the preliminary and permanent injunction request.

The plaintiff, Defenders of Wildlife, is a nonprofit conservation organization with approximately 37,000 individual members nationwide, of whom approximately 150 reside in the State of Nevada. P. Ex. 3.[1/] The Defenders of Wildlife brings

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1/ Plaintiffs' Exhibits are referred to as "P. Ex. __" and Nevada Exhibits are referred to as "Nevada Ex. __."

this action on behalf of itself and its members. The individual plaintiffs are members of the Defenders of Wildlife who reside in the State of Nevada. The defendants are the Secretary of Interior, the Assistant Secretary of Interior for Fish and Wildlife and Parks, and the Director of the United States Fish and Wildlife Service.

On July 10, 1978, the Court granted the motion of the State of Nevada to intervene as a party defendant and commenced the trial on the merits. At the commencement of the hearing, the State of Nevada moved for a change of venue under 28 U.S.C. § 1404, and the Court reserved ruling on the motion. Following the hearing at which the Court heard testimony and received exhibits from all parties, and after considerating the arguments of all counsel, on July 11, 1978 the Court declared the challenged regulation to be unlawful and granted plaintiffs' request for a permanent injunction.

Findings of Fact

I. Ruby Lake National Wildlife Refuge.

1.1 On July 2, 1938, by Executive Order No. 7923, President Franklin Roosevelt "reserved and set apart" the Refuge "as a refuge and breeding ground for migratory birds and other wildlife," in order to effectuate further the purposes of the Migratory Bird Conservation Act. The area so reserved and set apart, which was then denominated the Ruby Lake Migratory Waterfowl Refuge, comprised all lands and waters within a described area of approximately 37,640 acres in Elko and White Pine Counties, Nevada. 3 Fed. Reg. 1639 (July 7, 1938).

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1.2 Section 5 of the Migratory Bird Conservation Act, 16 U.S.C. § 715d, authorizes the United States to purchase, rent or otherwise reserve areas "for use as inviolate sanctuaries for migratory birds . . . ." Section 6 of this Act, 16 U.S.C. § 715e, requires that easements and reservations retained by any grantor from whom the United States received title "shall be subject to rules and regulations prescribed by the Secretary of [Interior] for the occupation, use, operation, protection and administration of the areas as inviolate sanctuaries for migratory birds . . . ."

1.3 The primary purpose for which the Refuge was established is for use as a refuge, breeding ground and inviolate sanctuary for migratory birds.

1.4 In 1963, the United States acquired 1,487.52 acres of privately-held land in White Pine County, Nevada, all lying within the area described and reserved on July 2, 1938, by Executive Order 7923. The area was acquired in order to allow unrestricted manipulation of the water in the Refuge for maximum benefit to migratory waterfowl and other wildlife. (Nevada Ex. 1).

1.5 Ruby Lake Refuge is listed in the Registry of National Landmarks as a National Natural Landmark. It is one of only 18 National Wildlife Refuges so designated. Landmark status is bestowed on areas which possess exceptional value in illustrating the natural heritage of our Nation. (P. Ex. 9 at II-12).

1.6 The Refuge consists of 25,150 acres of wetlands and 12,468 acres of surrounding uplands. The wetlands portion

of the Refuge consist of the 7,000-acre South Sump, which is the primary waterfowl nesting area, and the North and East Sumps, which are all maintained by a complex and intricate flowage of waters throughout the marsh basin. The average depth of water in the South Sump is approximately four feet, and in the North and East Sumps considerably less. (P. Ex. 9 at I-1, II-3, III-31 and 32).

1.7 The management objectives of the Refuge are: (1) to preserve, restore and enhance in their natural ecosystems all species of animals and plants that are endangered or threatened with becoming endangered on lands of the National Wildlife Refuge System; (2) to perpetuate the migratory bird resource for the benefit of people -- to manage the refuge for an annual production of 5,000 canvasbacks and 5,000 redheads; (3) to preserve natural diversity and abundance of mammals and non-migratory birds on refuge land; and (4) to provide understanding and appreciation of fish and wildlife ecology and man's role in his environment, and to provide visitors with high quality, safe, wholesome, and enjoyable recreation which is fully compatible and consistent with, and which in no way harms or interferes with the area's primary purpose as a refuge and breeding ground for migratory birds and other wildlife. (P. Ex. 9 at I-3).

1.8 All national wildlife refuges are maintained for the primary purpose of preserving, protecting and enhancing wildlife and other natural resources and of developing a national program of wildlife and ecological conservation and rehabilitation. These refuges are established for the restoration, preservation, development and management of

wildlife and wildlands habitat; for the protection and preservation of endangered or threatened species and their habitat; and for the management of wildlife and wildlands to obtain the maximum benefits from these resources. 50 C.F.R. § 25.11(b).

II. The Refuge Supports Canvasback and Redhead Ducks and a Diverse Population of Other Migratory Birds and Wildlife.

2.1 The Refuge provides one of the most important habitats and nesting areas for over-water nesting waterfowl in the United States. The Refuge is particularly valuable to the canvasback and redhead duck, which use the area in approximately equal numbers for nesting and broodrearing during the spring, summer and early fall. (P. Ex. 9 at I-1; P. Ex. 1 ¶ 5; and P. Ex. 2 ¶ 6).

2.2 Continental populations of both the redhead and the canvasback duck are low and both species have suffered throughout their respective ranges from encroachment and habitat loss. In 1972, the annual winter waterfowl inventory conducted by the United States Fish and Wildlife Service showed an all time low of 179,000 canvasbacks. The redhead has faced intensive drainage programs in the prairie-parkland region of central North America, the major breeding area of this species. A more comprehensive program oriented towards habitat protection is necessary to conserve and protect these species. (P. Ex. 9 at I-1; P. Ex. L ¶¶ 6-7; P. Ex. 4).

2.3 The canvasback duck and the redhead duck have been listed as "migratory birds," as defined by Section 11 of the Migratory Bird Conservation Act, 16 U.S.C. §715j, and

are protected by the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 to 711, and by the Convention for the Protection of Migratory Birds, August 16, 1916, United States - Great Britain (on behalf of Canada), 39 Stat. 1702, T.S. No. 628; the Convention for the Protection of Migratory Birds and Game Mammals, February 7, 1936, United States - Mexico, 50 Stat. 1311, T.S. No. 912; and the Convention for the Protection of Migratory Birds and Birds in Danger of Extinction, and Their Environment, March 4, 1972, United States - Japan, 25 U.S.T. 3329, T.I.A.S. No. 7990. 50 C.F.R. §§ 10.12 and 10.13; 42 Fed. Reg. 59358-62 (Nov. 16, 1977).

2.4 In addition to the canvasback and redhead duck, numerous species of waterfowl and other birds using the Refuge have been so designated as "migratory birds," including the prairie falcon, the peregrine falcon, the bald eagle, the golden eagle, the trumpeter swan, the white-faced ibis, the snowy egret, the great blue heron, the black-crowned night heron, the ruddy duck, the ringed-necked duck, the sandhill crane, the Canada goose, the coot and the cinnamon teal. (P. Ex. 9 at II-7 to II-9; P. Ex. 10 at 2-5; P. Ex. 20; P. Ex. 21; P. Ex. 22; 50 C.F.R. § 10.13; 42 Fed. Reg. 59359-62 (Nov. 16, 1977)).

Conclusions of Law

III. The Ruby Lake Special Regulations are Invalid in That They do not Include Appropriate Findings Necessary to Their Promulgation.

3.1 On April 21, 1978, the Secretary of Interior promulgated the Ruby Lake Special Regulations, 50 C.F.R. § 25.34, 43 Fed. Reg. 16981-83 (April 21, 1978) (hereinafter referred to as "regulations").

3.2 These regulations permit year-round boating in an area designated as Zone 1 in the South Sump by boats without motors or boats with electric motors.

3.3 Beginning on July 1 on the east side and July 15 on the west side of an area designated as Zone 2 of the South Sump, and extending until December 31, boats without motors, boats with electric motors and boats with internal combustion motors of unlimited horsepower are permitted. No boat may exceed 20 miles per hour in any area or 5 miles per hour in areas so designated by the Refuge Manager.

3.4 Beginning on July 1 and extending until December 31, waterskiing is permitted on a designated area from 10 a.m. to 5 p.m. daily.

3.5 Beginning on August 1 and extending until December 31, boats without motors, boats with electric motors and boats with internal combustion motors of unlimited horsepower are permitted in an area designated as Zone 3 of the South Sump. No boat may exceed 20 miles per hour in any area or 5 miles per hour in areas so designated.

3.6 The Refuge Recreation Act of 1962 (16 U.S.C. § 460K) governs the Secretary's authority to permit recreation within the Ruby Lake National Wildlife Refuge and all other areas within the National Wildlife Refuge System, national fish hatcheries and other conservation areas administered by the Secretary for fish and wildlife purposes. The Refuge Recreation Act provides in pertinent part that:

> "In recognition of mounting public demands for recreational opportunities on areas within the National Wildlife Refuge System, national fish hatcheries, and other conservation area administered by the Secretary of the Interior for fish and wildlife purposes; and in recognition also of the resulting imperative need, if such recreational opportunities are provided, to assure that any present or future recreational use will be compatible with, and will not prevent accomplishment of, the primary purposes for which the said conservation areas were acquired or established, the Secretary of the Interior is authorized, as an appropriate incidental or secondary use, to administer such areas or parts thereof for public recreation when in his judgment public recreation can be an appropriate incidental or secondary use: Provided, That such public recreation use shall be permitted only to the extent that is practicable and not inconsistent with other previously authorized Federal operations or with the primary objectives for which each particular area is established: Provided further, That in order to insure accomplishment of such primary objectives, the Secretary, after consideration of all authorized uses, purposes, and other pertinent factors relating to individual area, shall curtail public recreation use generally or certain types of public recreation use within individual areas or in portions thereof whenever he considers such action to be necessary: And provided further, That none of the aforesaid refuges, hatcheries, game ranges, and other conservation areas shall be used during any fiscal year for those forms of recreation that are not directly related to the primary purposes and functions of the individual area <u>until the Secretary shall have determined</u> --
>
> > (a) <u>that such recreational use will not interfere with the primary purposes for which the areas were established</u>, and

> (b) that funds are available for the development, operation, and maintenance of these permitted forms of recreation. This section shall not be construed to repeal or amend previous enactments relating to particular areas."
>
> Pub.L. 87-714, § 1, Sept. 28, 1962, 76 Stat. 653; Pub.L. 89-669, § 9, Oct. 15, 1966, 80 Stat. 930 (Emphasis added).

3.7 In supporting enactment, Congressman Dingell stated on the floor of the House:

> "The Secretary must make certain findings before he throws these areas open to public use; the bill requires him to find, for example, that there is sufficient money available to administer and protect these areas, and he must find that the utilization for recreational use will not be harmful to the basic purpose of the refuges."
>
> 108 Cong. Rec. 5548 (April 2, 1962) (Emphasis added).

3.8 In determining to permit recreational use of a National Wildlife Refuge, the burden of proof is necessarily on the Secretary to demonstrate that such use is incidental to, compatible with, and does not interfere with the primary purpose of the refuge as "an inviolate sanctuary for migratory birds."

3.9 The regulations violate the statutory standard because the Secretary failed to make the determination required by the statute that the permitted recreational use would not interfere with the Refuge's primary purpose an an "inviolate sanctuary for migratory birds."

3.10 The Refuge Recreation Act does not permit the Secretary to weigh or balance economic, political or recreational interests against the primary purpose of the Refuge.

3.11 When Congress has sought to authorize the weighing or balancing of competing interests it has done so explicitly. See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(BB).

3.12 Neither poor administration of the Refuge in the past, nor prior interferences with its primary purposes, nor past recreational uses, nor deterioration of its wildlife resource since its establishment, nor administrative custom or tradition alters the statutory standard. The Refuge Recreation Act permits recreational use only when it will not interfere with the primary purpose for which the Refuge "was established." The prior operation of the Refuge in a manner inconsistent with that purpose does not change the base point for applying the statute's standard. Past recreational use is irrelevant to the statutory standard except insofar as deterioration of the wildlife resource from prior recreational use serves to increase the need to protect, enhance and preserve the resource. Past recreational abuses may indeed require the Secretary to curtail recreational use to an even greater degree than mandated by the Refuge Recreation Act, in order to restore and rehabilitate the area promptly as required by the Secretary's existing regulations. 50 C.F.R. § 25.11(b).

IV. This Court Will Not Supply Findings to Support the Regulations on Behalf of the Secretary.

4.1 It is not the function of this Court to make findings, on behalf of the Secretary, that the regulations will not be harmful to the primary purpose of the refuge. See 50 C.F.R. § 26.33.

4.2 In the background material preceding the regulations in the Federal Register, the Secretary through his assistants cited problems "directly attributable to the continued use of large powerboats at Ruby Lake." 43 Fed. Reg. at 16981.

4.3 The legislative history of the Refuge Recreation Act indicates that motorboating is inconsistent with refuge purposes.[2/] See Statement of Congressman Dingell, 108 Cong. Rec. 5549 (April 2, 1962) ("almost invariably destructive of refuge purposes").

4.4 In adopting these regulations the Assistant Secretary balanced economic, political and recreational interests against the primary wildlife purpose of the refuge and reached a compromise. (P. Ex. 11).

4.5 The compromise reached by the Assistant Secretary in adopting these regulations was not supported by certain members of his staff. The former Refuge Manager, an expert in wildlife biology and management, testified in opposition to the regulation. The Deputy Associate Director for Wildlife refused to surname the regulations because in his opinion the regulations were not in the best interest of the Refuge and the resources for which it was established. (P. Ex. 32).

2/ Substantial evidence has been presented to this Court regarding the effect of motorboating on migratory bird population. Our limited holding makes it unnecessary for us to perform what we perceive to be an essentially administrative function, i.e., assessing numerous variables and prescribing regulations which would permit recreation and other secondary uses without interfering with the primary use. We note that the Secretary has been presented with optional plans which would allow secondary uses which do not interfere with the primary purpose. See P. Ex. 9 (proposals IV, V).

An Order consistent with the foregoing Findings of Fact and Conclusions of Law has been entered this day.

John H. Pratt
United States District Judge

July 14, 1978

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK

By M. J. Dudley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 78-1210
)
CECIL D. ANDRUS et al.,)
)
Defendants.)

FILED

JUL 14 1978

JAMES F. DAVEY, Clerk

ORDER

In accordance with the Findings of Fact and Conclusions of Law issued this day, it is hereby

ORDERED;

1. The Ruby Lake Special Regulations (43 Fed. Reg. 16981) are declared unlawful.

2. Defendant Secretary of the Interior is hereby permanently enjoined from acting pursuant to the above cited regulations.

3. The Secretary shall, within five (5) days of the date of this Order, promulgate regulations which permit secondary uses of Ruby Lake only insofar as such usages are not inconsistent with the primary purpose for which the refuge was established.

4. In accordance with his statutory obligation, 16 U.S.C. § 460K, the Secretary shall take all appropriate and necessary steps to enforce the resulting regulations.

5. This action is dismissed.

John N. Pratt
United States District Judge

July 14, 1978

United States District Court
for the District of Columbia
A TRUE COPY

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE, Plaintiff,	)	
v.	)	Civil Action No. 78-1332
CECIL D. ANDRUS et al., Defendants.	)	

FILED
AUG 16 1978
JAMES F. DAVEY, Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Public use of the Refuge currently exceeds 50,000 visitors each year. Approximately 30,000 boaters annually are now using the 7,000-acre South Sump that makes up the southern portion of the Refuge. P. Ex. 9 at I-1. In recent years the annual increase in boating has exceeded 19% and is projected to increase in the Elko County portion of the Refuge by over 300% by the year 2020. P. Ex. 9 at I-17, Figure 3.

2. The preferred nesting habitat for migratory birds is located in the South Sump. Although some nesting takes place outside this area, approximately 85% of canvasback and redhead production would occur in the South Sump. P. Ex. 9 at III-5, Figure 7.

3. The reproductive cycle of over-water nesting ducks at the Refuge consists of four distinct stages: nest site selection, initial nesting, late nesting and re-nesting, and broodrearing. Waterfowl production on the Refuge for any given year is determined by the breeding population density, nesting success, and duckling survival. P. Ex. 9 at III-1.

4. Hens flush easily when disturbed by either canoe or powerboat even after nesting is well underway (P. Ex. 31 at 6), but this disturbance decreases as incubation proceeds.

5. Powerboating may cause abandonment of established nests. P. Ex. 9 at III-12, III-14 to III-16.

6. Re-nesting may occur when the first nest is lost through predation, destruction or abandonment. Re-nesting is an ordinary occurrence for canvasback and redhead ducks and re-nesting success is essential to the maintenance of production levels of the Refuge. Approximately once every four years canvasback and redhead ducks nest later than usual due to climatic conditions. Late nesting and re-nesting ducks go through both nest site selection and actual nesting stages, which together extend from May 15 through September 1. P. Ex. 9 at III-14 to III-19, VIII-49. Even in normal years delayed nesting is typical of redheads throughout their range. P. Ex. 9 at III-15. Re-nesting may account for up to 46% of the total nesting of redhead ducks in a given season. P. Ex. 9 at III-14.

7. Broodrearing is the period from the hatching of the egg until the hen abandons the brood. During broodrearing, ducklings are dependent upon the hen for safety, and their vulnerability to predators is increased in her absence. Disturbances caused by internal combustion powerboats may separate hens from ducklings. Broodrearing continues from about April 25 to September 30 in each season. P. Ex. 9 at III-20 to III-24.

8. Mechanical cutting action of propellers on aquatic vegetation and increased turbidity caused by motors

decreases vegetative productivity of the Refuge. Emergent vegetation such as hard-stem bulrush, used by migratory waterfowl for nesting, may be removed by motorboats creating new channels. P. Ex. 9 at III-29 to III-38; P. Ex. 28; P. Ex. 29.

9. Samples taken on the Refuge demonstrate that where no boating was permitted the marsh produced 328% more submergent vegetation than in areas of heavy boating. P. Ex. 9 at III-30, Table 8.

10. Nesting ducks on the Refuge may be flushed from their nests by the noise of a 25 horsepower boat passing at full throttle within 300 yards of the nest. P. Ex. 9 at III-6.

11. Total Refuge waterfowl use days show a steady downward trend over the past twenty years and it appears that the most obvious cause for the decline in waterfowl use is human disturbance. P. Ex. 9 at III-28.

12. Unlimited horsepower powerboating without appropriate regulation has had unavoidable adverse impacts on over-water nesting waterfowl and has resulted in lower waterfowl production and less wildlife diversity. P. Ex. 9 at V-1; P. Ex. 1 ¶ 15; P. Ex. 2 ¶ 8.

13. The annual loss of waterfowl production in any particular year due to boating activities is an irretrievable loss to the continental waterfowl population. P. Ex. 9 at VII-1.

14. When boats of unlimited horsepower are permitted without appropriate regulation, the long-term effects of

boating are cumulative and will ultimately determine the number of birds returning to nest at the Refuge in future years. P. Ex. 9 at VI-1, VII-1.

15. The impacts of boating under the circumstances described in paragraph 14 above, extend to other wildlife species found on the Refuge and may be essentially similar to those on canvasbacks and redheads for other over-water nesting waterfowl including the ruddy duck. P. Ex. 10 at 2.

16. Waterskiing in a waterfowl nesting area within a migratory bird sanctuary does not promote or enhance, and may harm, waterfowl habitat, nest site selection, nesting, re-nesting, late nesting, or broodrearing.

17. The use of unlimited horsepower internal combustion motors in a waterfowl nesting area within a migratory bird sanctuary does not promote or enhance, and may harm, waterfowl habitat, nest site selection, nesting, re-nesting, late nesting or broodrearing.

18. On July 19, 1978, the Director, Fish and Wildlife Service, signed special regulations which permit powerboating, motorless boating, and waterskiing within the Ruby Lake National Wildlife Refuge (the "Refuge"). These July 19, 1978 regulations are in large part the same as the April 21, 1978 special regulations which this Court held to be unlawful in Defenders of Wildlife et al. v. Andrus et al., Civil Action No. 78-1210.

19. If the regulations are permitted to continue in effect they will immediately and irreparably damage plaintiff's interests and the wildlife resources of the Refuge.

The use of powerboats of unlimited horsepower on the Refuge (including for waterskiing) will directly and immediately harm the wildlife resources of the Refuge (i) by reducing submergent aquatic vegetation which is the principal food source for migratory waterfowl (P. Ex. 9 at III-29 to III-38, V-1); (ii) by reducing macroinvertebrate populations which are the principal food sources for ducklings (Id.); (iii) by breaking up broods, by separating ducklings from their hen, by forcing broods out of brooding areas, and thereby reducing brood size (P. Ex. 9 at III-20); and (iv) by reducing the reproductive success of late nesting and re-nesting hens. P. Ex. 9 at III-8, III-13 to III-20, III-28, III-38, VIII-48, VIII-49.

20. Late nesting and re-nesting extends through September 1 of each season and occurs with sufficient frequency to be significant to the immediate and long-term productivity of the Refuge. P. Ex. 9 at III-14 to III-18.

21(a). The level of boating use permitted by these regulations is not incidental to or compatible with, and will interfere with the primary purpose of the Refuge.

(b). The suggestion that horsepower limitations would not be appropriate, and would not aid the primary purpose of the Refuge, is completely contrary to all reason and the facts of the record.

(c). The proposed speed limitations to be used in conjunction with horsepower are so obviously unenforceable that to rely on a speed li tation, even as high as twenty miles an hour, is unrealistic because of its very unenforceability.

95-700 O—82——13

Conclusions of Law

22. The regulations violate the statutory standard of the Refuge Recreation Act because the degree and manner of boating use which they would permit is not incidental or secondary use, is inconsistent, and would interfere with the Refuge's primary purpose.

23. The regulations violate the statutory standard of the Refuge Recreation Act because the degree and manner of boating use which they would permit is not practicable because of their unenforceability.

24. The Secretary's determination that the level of boating permitted by the regulations does not interfere with the Refuge's primary purpose is arbitrary and capricious.

25. Based on the record in this action, the use of boats with unlimited horsepower in the South Sump of the Refuge is inconsistent and interferes with its primary purpose as a refuge and breeding ground for migratory birds and wildlife.

An Order consistent with the foregoing Findings of Fact and Conclusions of Law has been entered this day.

J. H. Pratt

John H. Pratt
United States District Judge

August 18, 1978

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK,
By M. J. Dunkley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DEFENDERS OF WILDLIFE et al.,)
)
Plaintiffs,)
)
v.) Civil Action No. 78-1332
)
CECIL D. ANDRUS et al.,)
)
Defendants.)

FILED

AUG 16 1978

JAMES F. DAVEY, Clerk

ORDER

In accordance with the Findings of Fact and Conclusions of Law issued this day, it is hereby

ORDERED:

1. The Ruby Lake Special Regulations (43 Fed. Reg. 32133 (July 25, 1978)) are declared unlawful.

2. Defendant Secretary of the Interior is hereby permanently enjoined from acting pursuant to the above cited regulations.

3. The Secretary shall, with fifteen (15) days of the date of this Order, promulgate regulations which permit secondary uses of Ruby Lake only insofar as such usages are not inconsistent with the primary purpose for which the Refuge was established. By consent of the parties, the provisions of the Temporary Restraining Order entered July 21, 1978, shall remain in effect until said regulations are promulgated.

4. In accordance with his statutory obligation, 16 U.S.C. § 460K, the Secretary shall take all appropriate and necessary steps to enforce the resulting regulations.

5. This action is dismissed upon promulgation by the defendant of the regulations referred to in paragraph 3 above.

John H. Pratt
United States District Judge

August 18, 1978

United States District Court
for the District of Columbia
A TRUE COPY

JAMES F. DAVEY, CLERK
By

EQUAL JUSTICE FOUNDATION

1346 Connecticut Avenue, N.W., Suite 525
Washington, D.C. 20036
(202) 452-1267

Susan Kellock
Executive Director

Katherine M. Holden
Chairperson

May 12, 1982

Senator Patrick J. Leahy
427 Russell Senate Office Building
U.S. Senate
Washington, D.C. 20510

Dear Senator Leahy:

The Equal Justice Foundation is a national organization of lawyers who commit one percent of their salaries to support access-to-justice work. On behalf of the membership, I write to express our opposition to legislative proposals to alter the basic federal venue statute (28 U.S.C. 1391). Current venue provisions are sufficiently flexible to take into account the convenience of all affected parties. We urge you to vigorously oppose efforts to limit venue in the District of Columbia federal courts.

Proponents of these so-called venue "reforms" have little empirical evidence to support their contention that an inordinate amount of public interest litigation is filed in Washington, D.C. courts. Our research indicates that claims made by groups such as the Capitol Legal Foundation (CLF) that environmentalists have established a "major ally" in the federal bench in Washington lack a factual basis. At the request of your staff, we are enclosing a detailed evaluation by the Equal Justice Foundation of CLF's Environmental Litigation Study - First Phase Report (9/17/81) for inclusion in the hearings record on this issue.

Please advise us if we can be of further assistance.

Sincerely,
Susan Kellock
Susan Kellock
Executive Director

95-700 O—82——14

EQUAL JUSTICE FOUNDATION

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Washington, D.C. 20036
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Susan Kellock
Executive Director

Katherine M. Holden
Chairperson

ANALYSIS OF THE

CAPITOL LEGAL FOUNDATION

ENVIRONMENTAL LITIGATION STUDY - 9/17/81

Analysis prepared by: James F. Drummond
Program Director
Equal Justice Foundation

Date: May 3, 1982

Overview

This paper analyzes the Capitol Legal Foundation's (CLF) Environmental Litigation Study - First Phase Report (dated 9/17/81). The assertion made by CLF that environmental groups seek to "manipulate" venue in order to have their cases heard by the D.C. circuit (in order to take advantage of "judicial prejudice")[1] is being proffered as a rationale for efforts to legislate changes in the basic federal venue statute (28 U.S.C. 1391). CLF and others are advocating alterations which would require that litigation involving environmental issues or the use of public lands be brought in the locale affected by the challenged action. It should be noted that while most venue "reform" proposals were originally aimed at environmental litigation, the language of floor amendments which were expected to be offered on recent regulatory reform legislation (S.1080) was expanded to cover all suits against the government.[2]

This document, prepared by the Equal Justice Foundation, focuses on a series of questions regarding CLF's Environmental Litigation Study for use in congressional hearings on venue reform legislation. Three specific aspects of CLF's First Phase Report are disputed:

(1) The premise that current venue laws are inadequate;

(2) That an inordinate amount of litigation is brought in the D.C. circuit;

(3) That the methodology employed in the CLF study is capable of yielding credible results.

The combination of these factors biases CLF's study and limits its utility in any serious debate over the public policy implications of venue reform.

(1) CLF's contention that current venue laws are inadequate has little support among legal scholars.

"Venue relates to the place where a matter is to be tried, not to whether it is to be tried, which is a question of jurisdiction."[3] It is "the particular... geographic area in which a court with jurisdiction may hear and determine a case."[4] The choice of venue is the plaintiff's, and is based upon four factors:

(1) where the defendant in the action resides;

(2) where the cause of action arose;

(3) where any real property in the action is situated;

(4) where the plaintiff resides if no real property is involved.[5]

Generally, venue statutes are designed to ensure that litigation is brought in a judicial forum which is convenient to the affected parties. The theme of all amendments to the basic section (28 U.S.C. 1391) has been to "broaden the venue requirements and remove impediments to aggrieved parties' pursuit of justice in the courts."[6] The most notable reforms to federal venue provisions were embodied in the Mandamus and Venue Act of 1962, which established the four criteria for determining venue cited above.[7] Prior to this legislation, "suits against federal officials to compel them to do things could only be brought in the nation's capital."[8]

The recommendations made by CLF run counter to this trend toward broadening venue, by relying on the anti-Washington rhetoric which characterizes the so-called Sagebrush Rebellion:

> "Access to the D.C. courts should and can be restricted by amending existing federal venue requirements. These statutes now permit, and in some cases require(d)

> a claim to be brought in federal district or appellate court in the District of Columbia. These provisions can be amended so that venue lies only in the district most directly affected by the suit."[9]

Despite the obvious political appeal of these arguments, the federal government and its responsible officials are located in Washington, D.C. The American Enterprise Institute, (AEI) which could not possibly be accused of environmental extremism, took the CLF position paper to task by noting that because the plaintiff has the option of choosing the turf "venue in Washington satisfies at least the government and one of the private parties - which is no less, but more than any other district can a priori guarantee."[10] The AEI editorial goes on to raise the practical issue of determining where venue would actually lie under these venue shifting proposals. Problems associated with ascertaining which districts are "directly" or "substantially" affected would be significant:

> Generations of lawyers...have nourished themselves on the fees from arguments over whether an "effect" has occured: and often gotten downright fat on the fees from arguments over further refinement of whether the effect has been "direct". Such arguments are... necessary to determine the merits of the case. But the most rudimentary cost-benefit analysis (speaking of regulatory reform) suggests the expense is not worth it merely to determine the preliminary question of where a suit may be brought. And on top of the lawyers fees, consider the possible delay: years arguing over venue before the argument on the merits even begins." (emphasis added)

The Department of Justice's testimony in hearings on venue shifting proposals make it clear that "...the present venue statute is working in an adequate and just manner... There are not an inordinate number of cases tried at the District of Columbia and the Department of Justice makes an effort to transfer cases to a local forum when the issues are ones which could be better handled there."[12] CLF's advocacy of a statutory shift of venue amounts to a thinly veiled attempt to harass environmentalists and to restrict their

access to judicial forums by making it more difficult to file suit at a convenient location. Under the guise of local control, however, venue shifting will open a pandora's box of unintended consequences that would disrupt and delay resolution of all types of litigation. The current practice of forum shopping, a tactic which is certainly not limited to environmentalists, has simply not generated enough problems to warrant such a radical restructuring of federal venue statutes.

(2) CLF's contention that an inordinate amount of environmental litigation is brought in the D.C. circuit has no factual basis.

A distinctive feature of CLF's analysis of environmental litigation is its complete absence of an accurate data base, particularly in terms of the level of activity in the D.C. circuit. The methodological weaknesses which resulted in a substantial overstatement of the role played by the D.C. circuit in deciding environmental cases will be further elucidated elsewhere in this paper. However, for purposes of contrast, it should be noted that CLF contends that:

> "The most significant finding in this area of our study is the role of the District of Columbia courts in environmental litigation. Out of the 105 federal district and circuit courts in this country, the two District of Columbia courts decided 32% of the cases we reviewed. The D.C. courts also chose to decide cases more appropriately decided by jurisdictions actually affected by the controversy, such as cases involving waterway and dam construction in other localities ...we suspect that the high percentage of cases decided by the D.C. courts may be due in no small measure to an inappropriate judicial reluctance to turn away environmental cases. This reluctance has caused the District of Columbia courts to accept cases which, in our opinion, were better decided by courts in other jurisdictions." (emphasis added)[13]

In fact, only some 7% of the environmental suits filed in the U.S. District courts are filed in the District of

Columbia, a situation acknowledged by one of the leading proponents of venue shifting, Senator DeConcini (D-NM).[14]

Hearings on venue shifting indicated that:

- of the 519 environmental cases filed in District courts in the twelve-month period ending June 30, 1978, only 37 (7.1%) were brought in the District of Columbia;
- during the following year, only 30 of 559 (5.4%) environmental suits were brought in the District of Columbia;
- in the Justice Department's Civil Division, only 25 (3.9%) of the 649 cases relating to environmental matters were pending in Washington as of September, 1980;
- with regard to National Environmental Policy Act (NEPA) cases, only 37 of 339 (10.9%) cases being handled by the Justice Department's Lands Division were in the District of Columbia as of September, 1980. A Council on Environmental Quality (CEQ) analysis of NEPA litigation since the enactment of the Act in 1970 indicated that through the end of 1977, only 131 of 950 cases (13.7%) had been filed in the nation's Capital;
- the CEQ data was refined further to demonstrate that of the 131 NEPA cases filed in Washington,
  * 39 (30%) involved rulemakings of nationwide application;
  * 29 (22%)involved impacts in and about the District of Columbia;
  * 8 (6.1%) were transferred to other districts;
  * 6 (4.5%) involved environmental issues or impacts affecting a milti-state region;

* 4 (3%) involved federal actions outside of the U.S.;

* 45 (34%) involved environmental issues or impacts which could legitimately be considered to be unrelated to the District of Columbia. Of these, only 25 were initialted by "environmental groups" while the remainder were brought by industries, state and local government, or unions.

- with regard to direct reviews of administrative action by the D.C. Court of Appeals, it should be recognized that Congress established this as the appropriate forum for review of environmental regulations under the Clean Air Act, the Safe Drinking Water Act, the Noise Control Act, and the Resource Conservation and Recovery Act. Despite this legialatively established preeminence during the twelve-month period ending June 30, 1978, only 33 of 155 (21.3%) cases for review of EPA orders were filed in the D.C. Court of Appeals. In the following year, 95 of 257 (37%) cases were brought in this forum.[15]

Clearly, the notion that a disproportionate amount of environmental litigation is brought in the Washington circuit in order to obtain a favorable judicial forum is not reflected in data available from unbiased sources, such as the Administrative Office of the United States Courts.

(3) The methodology employed in the CLF study lacks validity, and is biased to such an extent that the results obtained are not credible.

Unlike serious legal scholars who are engaged in the venue shifting debate, CLF employed a research methodology which could not withstand even a rudimentary analysis by critics of its position. The "sample" of cases chosen to

demonstrate that environmentalists somehow manage to steer their cases to a "remarkably sympathetic Washington, D.C. federal bench to win a shocking number of cases in D.C."[16] is in no way representative of the "universe"of environmental litigation. CLF took, in essence, an approach which assumes that a limited number of public interest groups with Washington offices constitute the entire environmental movement.

CLF conducted a scan of LEXIS computer system for cases involving these groups, and proceeded to evaluate the results of the litigation.[17] The 274 cases reviewed involved 85(31%) which were decided in D.C. over the last ten years. There was no indication in the CLF study of any attempt to ensure that this sampling of cases was representative of environmental litigation in general, a basic evaluation technique engaged in by most practioners. Similarly, it could be argued that the singling out of certain groups for examination would generate an inherently biased sample which would reflect the predilictions of those specific organizations and their counsel as opposed to all "environmentalists".

The focus on certain environmental groups significantly limits the utility of the CLF study in reasonable debates of public policy. A wealth of data is available from the Administrative Office of the United States Courts which could be used to construct a scientifically valid survey of environmental litigation. Unfortunately for CLF, as Nicholas Yost points out in his review of this issue, "Very few environmental cases against the government are brought in the District of Columbia, and most of those that are should be."[18] The public record is clear on this matter (about 7% of all environmental cases) and the use

of questionable sampling techniques undermines CLF's argument substantially.

Turning to the question of whether the D.C. courts are "remarkably sympathetic" to the environmental movement, such a conspiratorial notion is also reinforced by the analytical criteria employed in the CLF study. Their definition of a "win" for environmentalists in litigation made it "easier for a case to be consdiered a win than a loss."[19] In essence all an environmental group had to do was to win on any issue in a case for CLF to consider the suit a victory for environmentalists. (Even the most extremist environmental newsletter editor would not make such a claim!) This approach allows CLF to raise the specter of an overwhelming environmental legal machine, when in truth, prevailing on only one issue in a suit would hardly be considered a cause for celebration. Thus, claims made by CLF of an inordinate proportion of "wins" by environmentalists should be viewed with a clear understanding of their rather generous definition of the term.

Turning to the contention that the environmentalists have a "major ally in the D.C. federal courts"[20] and that these forums are "deciding cases differently than their peers on other federal cases",[21] CLF simply lacks adequate data to support these assertions. The judicial prejudice intimated in the CLF study could not possibly be shown without a detailed comparison among specific cases involving similar issues. By declaring a victory on the basis of a single finding in a complex case, CLF has weighted its evaluation criteria in such a way to make its conclusions pre-determined (and not in "favor" of environmentalists as its paper gratuitously claims).

A better measure of judicial fairness would be an

analysis of cases ultimately reversed by an appeal. Such an approach could provide a clearer indication of "prejudice" than the undifferentiated, simplistic, analytical techniques employed by CLF. Preliminary figures from an analysis conducted by the National Legal Aid and Defenders Association (NLADA) show that the reversal rate in the D.C. Curcuit is only 17.5%, compared to the national average of 19.2%. The burden is logically on CLF and other proponents of venue shifting to provide more persuasive evidence of their perceived prejudice before singling out the federal courts in Washington as the cause of such widespread mischief.

Still another statement made in CLF's study which lacks an empirical basis, is that "the high percentage of cases decided by the D.C. courts may be due in no small measure to an inappropriate judicial reluctance to turn away environmental cases."[23] Despite its lack of data regarding motions to change venue, and an analysis of the courts reasons for accepting or rejecting them, CLF asserted that, in its opinion, D.C. courts accepted cases which were better decided by courts in other jurisdictions. Again, without any basis the study is trying to convey an image of arbitrariness on the part of D.C. courts which seems to border on conspiratorial behavior. Such a notion is refuted by the small number of cases actually found in which a request for a change of venue to an "affected district" was denied questionable grounds by a D.C. court.[24]

Summarizing, CLF's limited focus on litigation involving certain groups did not by any means constitute a representative sample of environmental cases. Its analysis of these suits was based on superficial evaluation criteria which vastly overstated the effectiveness of liti-

gation by groups in the study. Assertions made regarding the D.C. courts as a forum which somehow provides undue perference for the arguments of environmentalists lack an empirical basis. Finally, "venue shopping", a common practice among all federal litigants, has not been persuasively shown to alter the ultimate outcome of specific cases.

FOOTNOTES

[1] See: Memorandum re: Environmental Litigation Study - First Phase Report; Capital Legal Foundation; 9/17/81, pg. 2.

[2] See: Yost, Nicholas, The Venue Amendment - A Threat to All of Us, Regulatory Reform Coalition's Analysis of S.1080 (undated), pg 32.

[3] Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, pg. 33.

[4] "Venue Reform: Sue West, Young Man", Regulation: American Enterprise Institute, January/February, 1982, pg. 10.

[5] Ibid, pg. 10

[6] Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, pg. 34.

[7] Pub. L. 87-748, 76 Stat. 244.

[8] Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, pg. 34.

[9] CLF Memorandum re: Environmental Litigation Study - First Phase Report, pgs. 10-11.

[10] Venue Reform :"Sue West, Young Man", pg. 11.

[11] Ibid, pg. 13.

[12] See Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, footnote 71, pgs, 42 and 43.

[13] Memorandum re: Environmental Litigation Study - First Phase Report, pgs. 8-9.

[14] See: Remarks of Senator DeConcini, 125 Cong. Rec. 59126 (daily ed. July 10, 1979).

15 Data summarized in Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, pgs. 48 and 49. (Drawn from an extensive review of the Senate hearing record, from a variety of sources. See footnotes 111 through 121 in Mr. Yost's article.)

16 CLF Memorandum re: Environmental Litigation Study - First Phase Report, page

17 The groups included the Environmental Defense Fund, Friends of the Earch, National Resources Defense Council, Sierra Club, The Wilderness Society, The Center for Law and Social Policy, and Citizens for a Better Environment - CLF Memorandum re: Environmental Litigation Study - First Phase Report, pg. 5.

18 Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, pg. 51.

19 CLF Memorandum re: Environmental Litigation Study - First Phase Report, pg. 2.

20 Ibid, pg. 3.

21 Ibid, pg. 10.

22 Data supplied by National Legal Aid and Defenders Association, phone conversation with Ellen Josephson, 4/82.

23 CLF Memorandum re: Environmental Litigation Study - First Phase Report, pg. 9.

24 Yost, Nicholas, Present Venue Provisions - Flexibility v. Inconvenience, pg. 43

PREPARED STATEMENT OF WILLIAM A. BUTLER
NATIONAL AUDUBON SOCIETY

Mr. Chairman and other members of the Committee, my name is William A. Butler. I am Vice President for Government Relations and Counsel for the National Audubon Society. As such, I head Audubon's Washington Office. Of relevance to these proceedings, I am also Adjunct Professor of Administrative and Environmental Law at Georgetown University, a member of the Administrative Conference, and have 12 years experience in federal court litigation. I thank you for the opportunity to submit this testimony before your Committee.

The National Audubon Society is very much opposed to S2419, Sections 3 and 4, which propose to amend the 28 USC Sections 1391 and 1404, respectively. (At this time we take no position on Sections 1 and 2, which propose to amend Sections 28 USC Sections 2112 and 604, respectively.) It is our firm belief that the proposed legislation will actually lead to <u>less</u> efficient judicial administration.

I have testified in previous sessions of Congress regarding this legislation, or variations upon it. Since that earlier testimony, two scholarly efforts in particular have been undertaken on the question. I refer to the article by Nicholas C. Yost, "Present Venue Provisions - Flexibility versus Inconvenience", and David P. Currie, "Venue and the Sagebrush Rebellion". These two articles are available in a pamphlet entitled "Venue at the Crossroads", published by the National Legal Center for the Public Interest in February, 1982. Both of these articles, but particularly that of Mr. Yost,

reflect my views on this proposed legislation with far greater precision and scholarly research than I am able here to devote to the subject. Therefore, unless these two articles are already contained in the record, I would request the Committee's permission to reprint them here following my brief statement.

I subscribe to the views of these two authors, particularly those of Mr. Yost. Paraphrasing the editor's preface to the above-referenced pamphlet, I believe with Mr. Yost that venue involves a variety of different factors, that the venue bill here seeks inprovidently to make local interest in a case the main criterion for determining venue, that local interests are difficult to distinguish in many cases from national interests, and that change in the venue law as proposed here will lead in fact to less efficient judicial administration by promoting threshold litigation on venue. I also believe that the facts show that the District of Columbia federal courts are not overburdened or especially slow, but rather that they are more efficient than many other District courts. Neither are they biased in favor of environmental plaintiffs. I particularly do not understand why environmental litigation must be singled out from all other forms of litigation for this type of "reform".

I agree with the views of Professor David Currie that it will be difficult to draft legislation, as illustrated by this bill, which does not lead to wasteful and extensive trials to determine venue. It seems to me as it does to him that the attitudes of

federal judges cannot and should not be tied over any period of time to their geographic location or place of origin. This is particularly true of the District of Columbia Circuit where judges are appointed from many different parts of the country.

Where there are legitimate concerns of those who might wish to change the venue law, they can be addressed by means which are less costly than changes in the venue provisions. For example, additional notice requirements for state attorney generals may under certain circumstances be appropriate. By and large, however, if one were to make a list of the 25 or even 50 most important legal problems currently needing legislative reform, the concerns raised by the venue sections of the current law addressed in Sections 3 and 4 of the proposed bill would not even make the list. The present venue provisions work well, and are fair. Judges determine on the particular facts where venue, if challenged, is most appropriate. I have always believed in the adage, now more than ever, that "when it ain't broke, don't fix it".

I commend the attached two articles to the Committee for careful consideration. Thank you for permitting me to make my views known, and to draw to the Committee's attention these scholarly efforts.

COLLEGE OF LAW
THE UNIVERSITY OF WYOMING
LARAMIE, WYOMING 82071
May 14, 1982

The Honorable Alan K. Simpson
6205 Dirkson Senate Office Building
Washington, D. C. 20510

Re: Senate Bill 2419

Dear Senator Simpson:

I write to you again in opposition to your federal venue bill, which I understand was not made part of the Senate's regulatory reform bill, but is now pending, in revised form, as S. 2419 before the Senate Judiciary Committee.

Because the bill's fundamental provisions and its obviously intended effect remain the same, my basic objections are as stated in my letter of December 3, 1981. Essentially, I believe that such an amendment would not be in the interests of justice, public policy, or sound statesmanship.

Most significantly, I believe that it is bad policy and dangerous precedent to politicize the otherwise neutral venue provisions in our federal judicial code. Venue is properly determined on a case-by-case basis based upon the convenience of parties and witnesses and the particular circumstances of the litigation--as are presently the considerations looked to by the court when a motion to change venue is made under 28 U.S.C. § 1404(a). Ample opportunity is provided under § 1404(a), in its present form, for the transfer of appropriate cases to the most desirable local district, upon motion of either an intervenor or the government itself. The change which you propose to make in Section 1404--to make of paramount importance the locus of the "substantially greater impact"--on its face seems to place undue emphasis upon that single factor. On the other hand, if courts read the final "unless" clause in your proposed new subsection (e) to retain the "interests of justice" as the primary concern, you have merely taken us in a circle for the sake of rhetoric.

The same objections, of course, apply to your proposed amendment of Section 2112, to make the "impact"of the agency action of greatest concern to the Courts of Appeals as well, when a motion to transfer has been made in an agency review proceeding within their jurisdiction. In this instance, however, your proposed subsection (b)(4) recognizes that the petitioner's decision to seek review of an agency rule in the judicial circuit in which he resides should, nevertheless, be

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controlling. If the petitioner's choice to challenge rule-making where he resides is determinative when jurisdiction is in the Circuit Courts, why should the plaintiff's choice not be similarly respected when review is in the District Courts? Such deference to the plaintiff's choice of forum is traditional. Your recognition of this policy in your proposed amendments to Section 2112, of course, means that most federal agency rules challenged by associations based in the District of Columbia will continue to be reviewed in the D. C. Circuit. Thus, your complicated amendments to our federal venue statutes would seem to produce only more legal complexity without any uniform advancement of your purpose.

The central problem with your proposed amendments to Sections 1404 and 2112 is the same as the most significant problem with your proposed change in Section 1391: the requirement that courts determine whether the challenged agency action would "substantially affect" the residents in that judicial district (or circuit), and decide where such effects are "greater." The vagueness inherent in such language can only produce much time-consuming and unproductive litigation.

In the case of your proposed amendment to Section 1391, as I pointed out in my previous letter, it is entirely possible that a court would construe this language to require nothing more than the sort of showing that will satisfy basic standing requirements. In other words, a court could well hold that a trade association could sue in the D. C. District Court so long as an "injury in fact" to one of its members in the District was alleged to be caused by the agency action. On the other hand, courts could just as easily become embroiled in trying to determine exactly what sort of, and how much, effect upon the residents of a district would be enough to be "substantial." This is certainly the sort of issue that I would hate to litigate--unless, of course, I were only interested in delay. Moreover, I cannot foresee how a court would properly, or even possibly, assess the effects upon "residents" not parties to the lawsuit. In asking the courts to deal with such unfamiliar concepts, you are inviting them to generate great uncertainty in the preliminary stages of litigation, or else to avoid such uncertainty through the most narrow and limiting construction of your amendments.

Assuming that one of your purposes in introducing S. 2419 is to get cases out of the D. C. courts and into courts in which more "sensitive" decisions will be made on matters of local concern, I believe that your approach is erroneously premised in several respects. First, contrary to some political rhetoric, most lawsuits against the federal government in which a local interest is at stake are presently brought in the local districts and circuits. The preponderance of administrative

litigation which is brought in the D. C. District and Circuit Courts concerns rulemaking of national application. Certainly these cases are best and most conveniently tried in the D. C. courts.

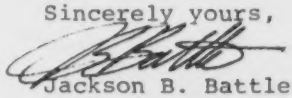
Second, the D. C. courts can no longer be characterized as "liberal" courts supportive of big government. If this was ever the case, it was only true for a brief period of time--something that can be said of all courts with changing membership. Industries as well as environmental groups, employers as well as trade unions, often select the D. C. courts as the "best" forum. Although forum-shopping will always go on whenever lawyers perceive an advantage in a particular court, the D. C. courts are often selected by parties of all persuasions for completely neutral, and quite desirable, reasons. Aside from the fact that government parties and witnesses, as well as administrative records, are typically located in District of Columbia, private parties often desire to litigate through trade associations or other organizations based in the District; and they often desire the services of administrative lawyers with the sort of expertise found there.

Finally, it is usually in the interest of all parties concerned (especially businesses) to have a decision based upon the soundest of legal principles, which will provide the greatest predictability for future decision-making. The biggest problem which businesses face with regulation is that what is caused by uncertainty. To the extent that the D. C. District and Circuit Courts are recognized to contain the highest level of judicial expertise in administrative law, their decisions are more likely to generate predictability and serve as secure precedent for similar subsequent cases than are decisions reached by "less specialized" courts in other circuits.

For all of these reasons, Senator Simpson, I urge you to reconsider your support for this bill. Although I write these views purely in my personal capacity, I believe that they are consistent with a neutral scholarly approach to federal procedure.

If I can provide any further perspective on this matter, please let me know.

Sincerely yours,



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May 20, 1982

Honorable Alan K. Simpson
4107 Dirksen Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Simpson:

I am writing on behalf of the National Legal Aid and Defender Association to express our opposition to S. 2419, a bill which would radically restructure federal venue law. Since we have already submitted for the record a general discussion of the bill, see, "Venue: The Case for Existing Law," I would like to take this opportunity to address specifically the implications of S. 2419 for civil rights litigation. I request that this letter also be included in the record.

The sponsors of S. 2419 appear to agree with us that it would be extremely inappropriate to change existing venue law for civil rights cases. Of all types of litigation, it is perhaps most important that the choice of the neutral and expert forum provided by the D.C. federal courts be maintained in civil rights cases. To this end, a section has been included in the amendment to the district court venue statute, 28 U.S.C. §1391(e) (Sec. 3 of the bill) which states that "[n]othing in the amendments made by subsection (a) of this subsection shall be construed to affect venue in an action relating to civil rights."

While we certainly support the sentiment represented by this language, the section itself is totally insufficient to accomplish its goal. First, there is no parallel language in the amendment to the transfer statute, 28 U.S.C. §1404 (Sec. 4 of the bill). Because that section is framed in mandatory language ("... a district court shall, upon motion of any party thereto, transfer the action...") it would negate any exemption suggested by the amendment to §1391(e). If there is to be a successful civil rights exemption, there must therefore be clear parallel language in any transfer provision which is enacted into law.

The problems, however, do not stop there. Section 3 of the bill states that venue in civil rights actions shall not be affected by the amendments but it leaves no law in place to govern venue in those actions. Section 1391(e) as it currently exists will be gone; do the sponsors intend that it somehow be preserved in a note or similar fashion so that courts and litigants will know how to determine venue in civil rights cases? In order to avoid inevitable confusion, a section which would specifically apply to civil rights cases must be included in the amendments. Presumably, it would be identical to the current §1391(e).

A final significant problem is raised by the meaning of "civil rights." It is not the term of art that some apparently consider it and there will be a great deal of controversy over exactly what cases the exemption will apply to. Examples of problem areas which will undoubtedly arise include Indian treaty litigation and disputes regarding federal public benefit programs. A slightly different version of this problem will arise in cases involving both federal and non-federal defendants where there is a civil-rights claim against the non-federal party but the claim against the federal party is determined, by whatever standard, to be non-civil-rights in nature. An example would be a case challenging federal approval of a state's AFDC program where there would be a §1983 and, hence, civil rights claim against the state but only an Administrative Procedure Act or similar claim against the federal government. Would that litigation fall within the civil rights exemption? While we certainly think it should, it is not at all clear from the language of the amendments.

In sum, while we applaud the apparent intent of the drafters of S. 2419 to exempt civil rights litigation from its coverage, we are very concerned that this will not be the effect of the legislation. As a result, we urge that, at the very least, S. 2419 be amended to leave no question that civil rights cases will be unaffected by its terms in practice.

Sincerely yours,

Ellen Josephson

Ellen Josephson
Access to Justice Project

cc: Honorable Patrick J. Leahy

VENUE

THE CASE FOR EXISTING LAW

Prepared by:

The National Legal Aid and Defenders Association

The Natural Resources Defense Council

Legislation has been introduced which would radically alter the current scheme of determining venue in civil actions brought against the federal government, its officers and agencies. The proposal's principal thrust is to make it extremely difficult for a private citizen to sue a federal defendant in the Washington, D.C. federal courts. In so doing, it would replace the existing law which provides maximum flexibility keyed to the convenience of the parties with an arbitrary, cumbersome and ill-defined alternative. We urge that it be opposed.

Venue refers to where, geographically, a case may be brought. It is distinct from jurisdiction, or the power of a court to hear a case. Under current venue law, a suit against federal government officials or agencies may be brought where the defendant or plaintiff resides, where the cause of action arose, or where the real property is located. 28 U.S.C. §1391(e). Because a defendant's residence is considered to be his or her place of doing business, a plaintiff usually has the option of bringing suit in Washington, D.C. when the defendant is a federal officer or agency.

The broad choice of forum in §1391(e) is tempered by a second provision which gives trial judges discretion to transfer suits to a more appropriate forum "for the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. §1404(a). This section is by no means mere windowdressing; it is routinely used to transfer cases. A similar choice of forum subject to correcting transfer governs cases originally filed in the U.S.

Courts of Appeals. 28 U.S.C. §2112.

The proposed legislation would restrict the choice of forum by providing that cases against federal defendants may be brought in the district where the plaintiff or defendant resides only if the "residents" of that district would be "substantially affected" by the action or failure to act which is at issue. It defines the district where a cause of action arises to be that where the "residents would be substantially affected" and creates a presumption that cases should be transferred to that district "in which the action would have a substantially greater impact." The intent of all of this is to make it virtually impossible to bring suit against a federal defendant in Washington, D.C. except in matters of a purely local nature.

It should be emphasized that under the general venue statutes a plaintiff is never required to bring suit in Washington, D.C. The great majority of cases against federal defendants are not filed in D.C. (more than 93%* and increasing) because of obvious considerations of expense and convenience. However, the choice of the District of Columbia forum remains extremely important to plaintiffs for the following reasons:

1) The D.C. Courts are experienced and expert in many administrative law matters which are only rarely brought before other courts;

2) Federal decision makers, their records and their attorneys are in Washington, D.C. and are more easily -- and inexpensively -- available to courts and litigants there than anywhere else in the country;

3) The D.C. Courts often provide the only federal forum where plaintiffs from different judicial districts can join in one lawsuit, thus avoiding the need for duplicative litigation or complicated class actions.

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*See attached charts for a breakdown of where cases are filed

This legislation is also extremely troubling because of ambiguities which pervade its drafting. A few examples of this problem include:

1) What is the meaning of "substantially affected"? Must there always be one district where the residents are more substantially affected than any other? How would this be determined where residents of several districts are substantially affected in different ways, such as where a factory struggling to stay open and provide jobs in one district is causing environmental damage in another?

2) How would "substantial effect" be determined? Must a court take evidence and conduct a mini-trial on the venue issue? Can this be justified considering the ever-growing caseloads of the courts? Who would have the burden of proving that residents of one judicial district are more substantially affected than residents of another? The party seeking to change venue? The party seeking to protect its choice of venue?

3) What does "resident" mean? If a defendant's residence is determined by where he or she performs official duties for one purpose, wouldn't that same defendant be a resident under the "substantially affected" test? Isn't a plaintiff with standing "substantially affected"? Then, what is the purpose of the proposed limitation?

4) The legislation includes an exemption for civil rights cases but nowhere defines "civil rights." How broad is the exemption intended to be? Is the civil rights exemption in the amendment to §1391(e) effectively negated by the fact that there is no exemption in the amendments to the transfer provision?

The sponsors of this legislation have argued that it is based on notions of federalism and local control. This contention is effectively refuted by an article, "Venue Reform:

Sue West, Young Man?", in the January/February 1982 issue of Regulation, a publication of the American Enterprise Institute:

> It is a false federalism. These are in fact neither local judges, nor local issues. They are federal judges, charged with deciding whether federal agencies have properly applied federal law. If that law should have been a federal law in the first place (which Congress has already decided), then surely its application should be uniform nationwide.

Finally, to the extent that the venue proposal is cynically intended to determine the outcome of cases by forcing them into forums perceived to be more or less favorable to certain interests, it stands as a dangerous assault on the integrity of the federal court system. Again quoting from Regulation:

> The consequences of acknowledging that our various courts systematically reach different results - and fixing venue accordingly - are unacceptably corrosive.

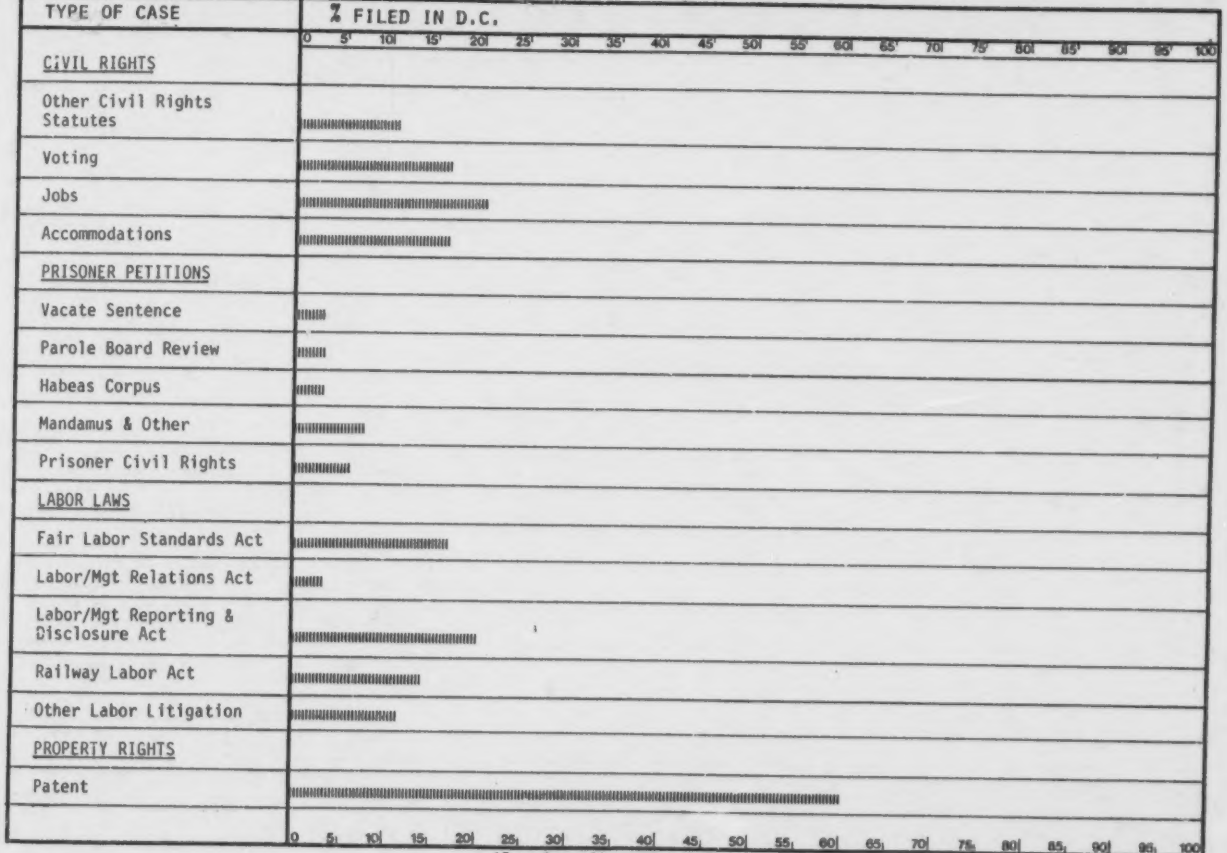
Because the great majority of cases against federal defendants are brought outside of the Washington, D.C. Courts, because the current system works well and serves important policy objectives, and because the pending venue proposal would create far more problems than it would ever solve, we strongly urge that the proposal be rejected by the Senate Judiciary Committee and the full Senate.

CIVIL CASES FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
AGAINST U.S. DEFENDANTS FOR THE 12-MONTH PERIOD ENDED 9-30-81*

TYPE OF CASE	% FILED IN D.C.
	0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
CONTRACT	
Insurance	
Marine	
Recovery of Overpayment & Enforcement of Judgments	
Other Contract Actions	
REAL PROPERTY	
Other Real Property Actions	
TORTS-PERSONAL INJURY	
Airplane	
Assault, Libel & Slander	
Marine	
Motor Vehicle	
Other Personal Injury	
Personal Injury-Medical Malpractice	
TORTS-PERSONAL PROPERTY DAMAGE	
Other Personal Property Damage	
	0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100

*Based on figures made available by the Administrative Office of the Courts.

CIVIL CASES FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
AGAINST U.S. DEFENDANTS FOR THE 12-MONTH PERIOD ENDED 9-30-81*


TYPE OF CASE
% FILED IN D.C.
0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
CIVIL RIGHTS
Other Civil Rights Statutes
Voting
Jobs
Accommodations
PRISONER PETITIONS
Vacate Sentence
Parole Board Review
Habeas Corpus
Mandamus & Other
Prisoner Civil Rights
LABOR LAWS
Fair Labor Standards Act
Labor/Mgt Relations Act
Labor/Mgt Reporting & Disclosure Act
Railway Labor Act
Other Labor Litigation
PROPERTY RIGHTS
Patent
0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100

*Based on figures made available by the Administrative Office of the Courts

CIVIL CASES FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
AGAINST U.S. DEFENDANTS FOR THE 12-MONTH PERIOD ENDED 9-30-81*

TYPE OF CASE	% FILED IN D.C.
	0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
SOCIAL SECURITY	
All Social Security	
OTHER STATUTES	
Banks & Banking	
Interstate Commerce	
Deportation	
Tax Suits	
Other Statutory Actions	
Economic Stabilization Act	
Environmental Matters	
Freedom of Information Act	
Negotiable Instruments	0
Land Condemnation	0
Rent, Lease, Ejectment	0
Torts to Land	0
Fraud or Truth-in-Lending	0
Antitrust	0
Bankruptcy Trustee	0
	0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100

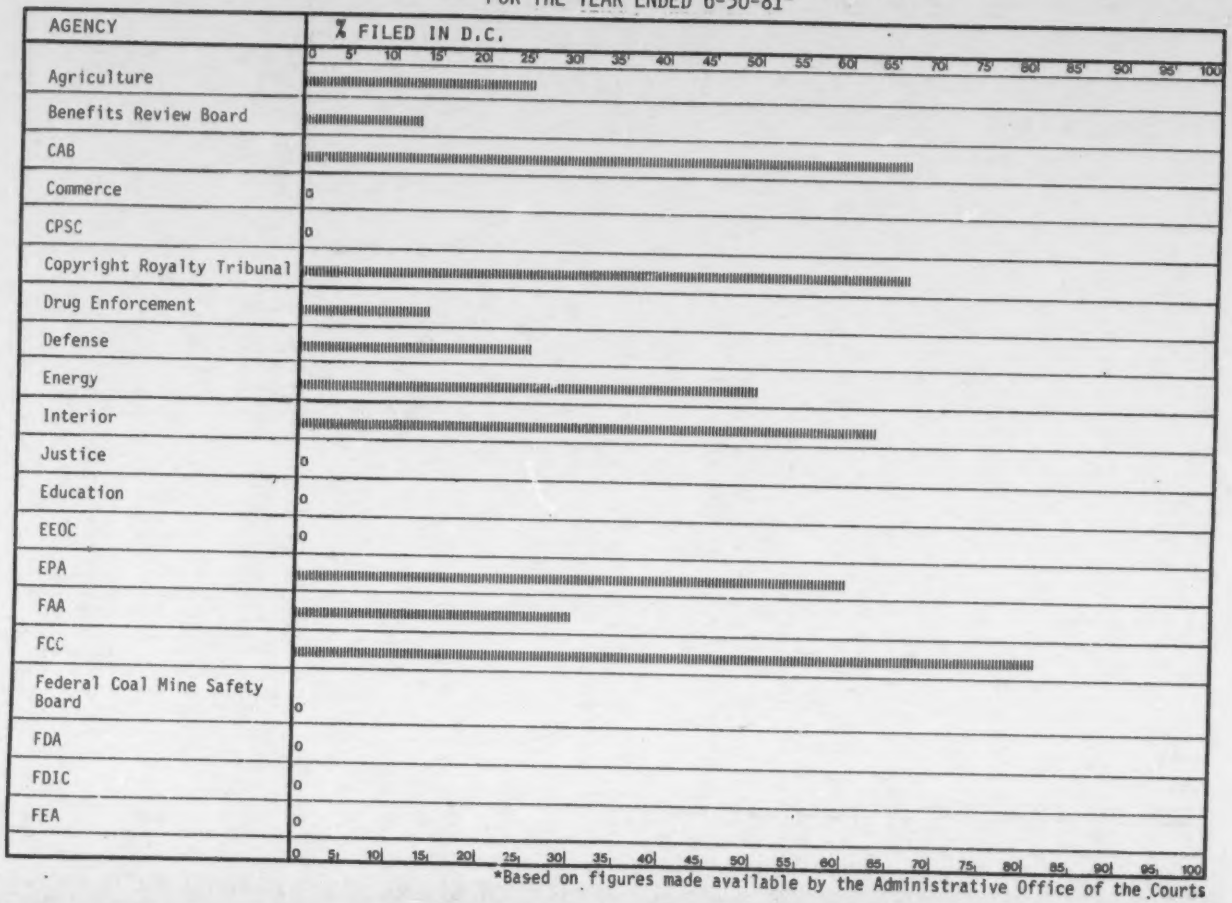
*Based on figures made available by the Administrative Office of the Courts

CIVIL CASES FILED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
AGAINST U.S. DEFENDANTS FOR THE 12-MONTH PERIOD ENDED 9-30-81*

TYPE OF CASE	% FILED IN D.C.
	0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
Bankruptcy Appeal	0
Black Lung	0
Securities, Commodities, Exchange	0
Customer Challenge	0
	0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100

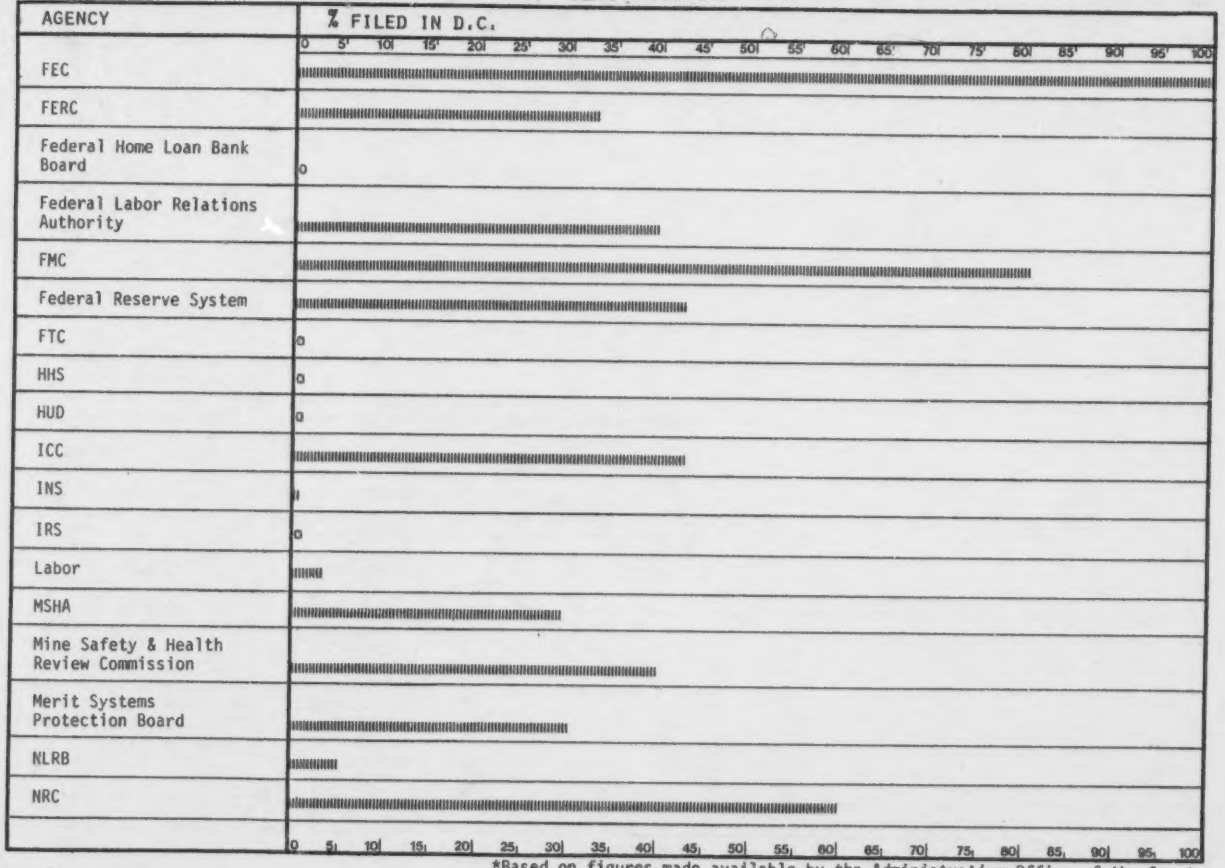
*Based on figures made available by the Administrative Office of the Courts

APPEALS OF FEDERAL AGENCY ACTIONS FILED IN U.S. COURTS OF APPEALS FOR THE YEAR ENDED 6-30-81*



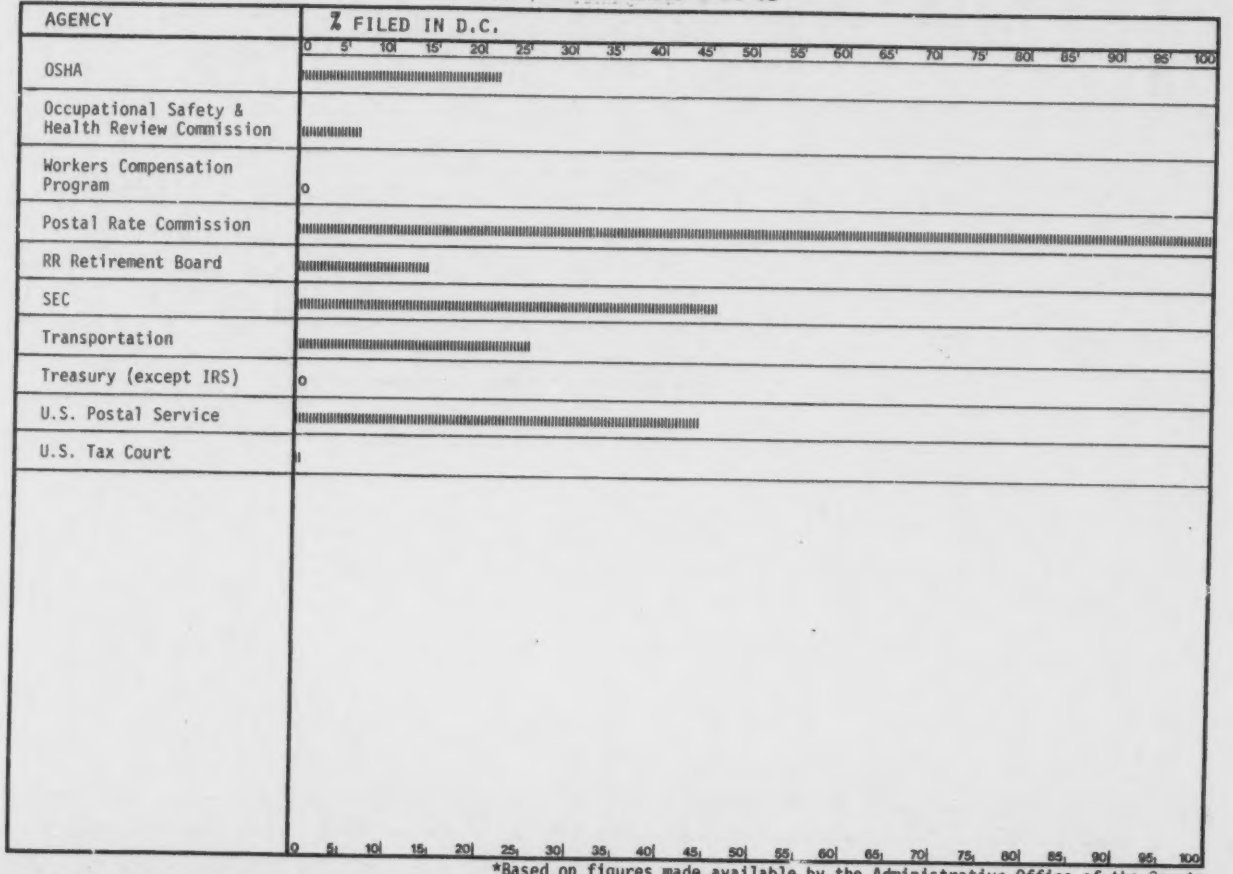
*Based on figures made available by the Administrative Office of the Courts

APPEALS OF FEDERAL AGENCY ACTIONS FILED IN U.S. COURTS OF APPEALS
FOR THE YEAR ENDED 6-30-81*



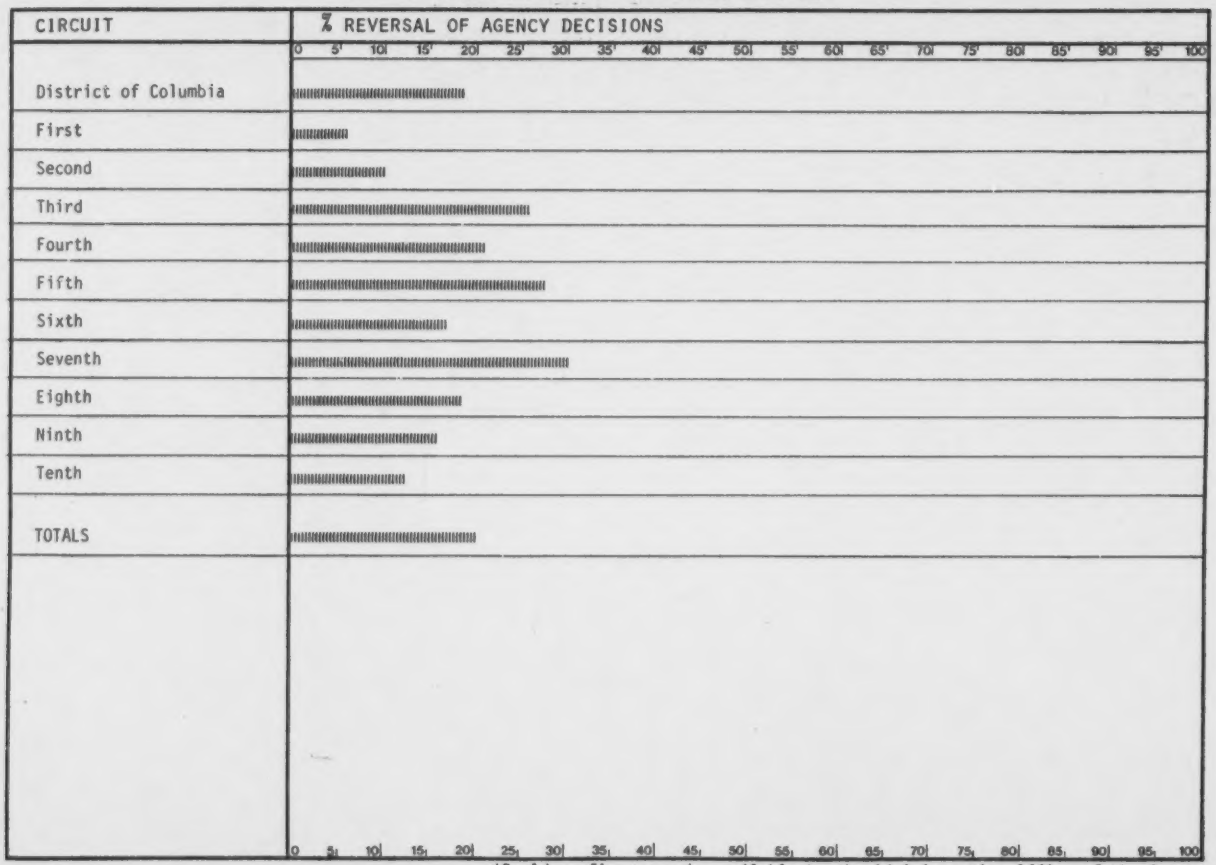
*Based on figures made available by the Administrative Office of the Courts.

APPEALS OF FEDERAL AGENCY ACTIONS FILED IN U.S. COURTS OF APPEALS
FOR THE YEAR ENDED 6-30-81*


AGENCY
% FILED IN D.C.
0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100
OSHA
Occupational Safety & Health Review Commission
Workers Compensation Program
Postal Rate Commission
RR Retirement Board
SEC
Transportation
Treasury (except IRS)
U.S. Postal Service
U.S. Tax Court

*Based on figures made available by the Administrative Office of the Courts.

APPEALS OF ADMINISTRATIVE AGENCY DECISIONS COMMENCED IN THE U.S. COURTS OF APPEALS FOR THE YEAR ENDED 9-30-81*



*Based on figures made available by the Administrative Office of the Courts

95-700 O—82—16

Shell Oil Company

One Shell Plaza
P. O. Box 2463
Houston, Texas 77001

Joseph W. Morris
Vice President
and General Counsel

May 21, 1982

The Honorable Alan K. Simpson
United States Senate
6205 Dirksen Senate Office Building
Washington, D. C. 20510

Dear Senator Simpson:

I commend you for your co-sponsorship with Senator DeConcini of S.2419.

Based on my experience as a former United States District Court Judge, it is my opinion that there is a great need for this kind of legislation. Court review of agency orders is certainly appropriate in a forum that has the most immediate relationship to the matter before the court. And it is important to note that this is permissive legislation only. That is to say, S.2419 has been drawn so as to make it possible to choose as a forum the judicial district or circuit which is most directly impacted by the agency conduct about which the complaint is being made. Surely permitting a choice of locale as to the venue situs is fair and reasonable. Surely this is to be preferred over a statute which mandates the forum.

I sincerely hope that your efforts to enact this legislation prevail.

Sincerely yours,

Joseph W Morris

cc - The Honorable Dennis DeConcini

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LLOYD BENTON MILLER
KEVIN A. GRIFFIN
MARINA C. JUSTICE

May 24, 1982

The Honorable Dennis DeConcini
Senate Judiciary Subcommittee
on the Constitution
119 D Street, Northeast
Room A601
Washington, D.C. 20510

Attention: Mr. Robert Feidler

Re: S.2419 - a bill to revise federal venue provisions.

Dear Senator DeConcini:

We represent a number of Indian tribes either as counsel or as counsel on specific litigation. Based on experience in the area of Indian law, we are convinced that S.2419, a bill to change federal venue provisions, would be an unnecessary hardship on Indian tribes.

We believe that the unique character of Indian litigation against the federal government fully justifies an exception for Indian tribes from the venue provisions of S.2419. First, litigation brought by Indian tribes generally has impact only on Indians themselves, not on the general public. Consequently the reasons for the venue changes are simply inapplicable to Indian claims against the federal government. Second, preventing tribes from maintaining suits in the District of Columbia would hamper the efforts of tribes to safeguard their rights in federal court.

As we understand it, S.2419 would do three things. First, it would change 28 U.S.C. 1391, the general federal statute for federal courts, so that in suits against federal officials, venue would not be proper in a district unless residents of that district would be substantially affected by the challenged federal action. Under present law, venue is proper in any district where either the plaintiff or a defendant resides. Second, your amendment would require a plaintiff in local environmental actions against federal officials to serve notice of the action upon the attorneys general of affected states. Third, the general statute authorizing transfer of actions for forum non conveniens, 28 U.S.C. 1404, would be amended generally to require suits against federal officials to be transferred to the district where the challenged federal action has the greatest impact. This is discretionary with the court under present law.

We understand that the main mischief your bill seeks to remedy is the adjudication of environmental cases against federal officials in districts, like the District of Columbia, distant from and unfamiliar with the controversies. We also understand that you share our concern for protecting the ability of tribes to safeguard their rights in federal court. Your interest in this issue is greatly appreciated because the unintended impact of S.2419 on Indian tribes is extremely threatening.

Because of the centralization of federal Indian administration in Washington, D.C., the great bulk of federal decisions

affecting Indians are made there. The decision-makers and, frequently, all available and pertinent records are in Washington. Suits against federal officials brought by Indian tribes rarely involve a local environmental controversy. Much more often, they concern the administration of federal programs that impact on Indians, or the implementation of Indian treaties. This is, as you know, a specialized area, long within the special competence of tribunals of the District of Columbia.

To illustrate, in 1978, the Standing Rock Sioux Tribe filed suit against the Secretary of the Interior to enjoin a nationwide cutback of Indian welfare payments. Standing Rock Sioux Tribe v. Andrus, Civil No. 78-0963. (D.D.C. 1978). Suit was filed in the District of Columbia, where the decision-maker and records were. A prompt and successful adjudication was essential, since cutbacks were to take effect immediately. If S.2419 had been law, we can readily imagine the government successfully stalling off a decision, by, for example, moving for a mandatory transfer of the case to Arizona or Oklahoma where the most affected Indians reside (although no plaintiff or defendant resided in those states, and no federal decision-maker and no pertinent records were there). At best, a judicial determination would have been delayed and irreparable harm suffered.

We suggest that -- whatever the merits of S.2419 for environmental cases -- it would work serious and presently unforeseen injustices in litigation brought by Indian tribes against federal officials to protect their rights. It is our understanding that you do not seek to burden the present right of Indian tribes to gain access to federal district courts guaranteed them under present law. 28 U.S.C. 1362. In order to clarify this position, we respectfully request that language similar to the following be included at the end of your proferred amendments to 28 U.S.C. 1391.

> "(c) Nothing in the amendments made by subsection (a) of this subsection shall be construed to affect venue in an action brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws or treaties of the United States."

We also respectfully request that you reconsider the proposed changes to 28 U.S.C. 1404. As you know, a district court already may, for convenience or in the interest of justice, transfer the civil action to another district court. Routine transfer of venue motions are now granted, particularly from the District Court for the District of Columbia. Your bill would make such transfer of venue virtually mandatory upon the motion of any party in a civil action in which a defendant is an officer or employee of the United States, or an agency of the United States, or the United States.

We urge you to include a savings provision similar to the following one at the end of the proposed revision to 28 U.S.C. 1404, in order to exempt Indian tribes from the mandatory transfer of venue requirements:

> "(f) Nothing in the amendment made by paragraph (e) shall be construed to affect transfer of venue in an action brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States."

The modifications we propose use the same language as in 28 U.S.C. 1362, and, therefore, would prevent attorneys from recruiting Indian tribes to avoid the thrust of the amendment.

We appreciate your concern in protecting Indian rights -- including the necessity of access to a forum of choice -- and hope you will propose amendments along the lines we have set out to prevent the erosion of these rights.

Sincerely,

Kenneth J. Guido, Jr.

cc: Tribal Chairmen

KJG/ld

Natural Resources Defense Council, Inc.

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415 421-6561

May 24, 1982

The Honorable Patrick J. Leahy
United States Senate
Washington, D.C. 20510

Dear Senator Leahy:

I am writing to express my concern with the provisions of S. 2419, which makes major changes in the venue for litigation concerning environmental statutes. Others have commented on a number of defects in the bill as it relates to District Court litigation. I would like to focus on the impact the bill would have on judicial review of agency rulemaking in the Courts of Appeals, specifically rulemaking by the Environmental Protection Agency under the Clean Air Act.

Section 307 of the Clean Air Act establishes venue provisions for review of EPA rules under that Act. Depending on the nature of the rule in issue, Section 307 provides for review either exclusively in the U.S. Court of Appeals for the District of Columbia Circuit or in any appropriate U.S. Court of Appeals.

If the challenged rule is a "nationally applicable regulation" or is "based on a determination of nationwide scope and effect" then review is directed in the District of Columbia Circuit. Any rule which is "locally or regionally applicable" is to be filed in "the appropriate circuit."

The current Clean Air Act thus minimizes the risk of conflicts between circuits by requiring nationally applicable rules to be reviewed in one circuit. At the same time it ensures that rules of local or regional applicability will be reviewed in a circuit which is appropriate given the local or regional nature of the controversy. Changing this common-sense venue rule as S. 2419 does, would run the risk of delaying the course of judicial review, increasing the likelihood of conflicts between circuits and increasing regulatory uncertainty.

S. 2419 will delay judicial review by transforming nearly every challenge to an agency rule into two separate judicial proceedings. When petitions are filed in different circuits the first proceeding will be a venue proceeding conducted in a circuit chosen at random. This court must adjudicate arguments regarding the circuit in which the rule under review will have the greatest impact and transfer the proceeding to that circuit for a second proceeding to review the rule itself.

The venue inquiry may require a substantial evaluation of the administrative record by the court to identify the nature and extent of the rule's impacts and where in the country those impacts are likely to occur. The time required for such a review may be lengthy. One should ask what the court will do in the event the agency record is inadequate to determine which circuit will receive the greatest impact. Will the court remand to the agency? Will the court take evidence on the matter?

Determining which circuit will receive the greatest impact may require the court to compare monetary and non-monetary impacts. Section 123 of the Clean Air Act requires EPA to promulgate regulations defining allowable stack heights. Under S. 2419 is the proper venue for review of the rule in the circuit where the majority of the "tall stack" sources are located or in the circuit where the pollutants from the stacks are transported? Section 202 of the Clean Air Act requires EPA to set emission standards for motor vehicles. Is the proper circuit for review the one in which the manufacturers do business or the ones in which the vehicles will be operated?

S. 2419 will also introduce the opportunity for conflicts between the circuits regarding EPA's national standard-setting authorities. Section 109 of the Clean Air Act requires EPA to establish and periodically revise national ambient air quality standards. These are uniform standards which regulate the quality of the air throughout the nation. Yet under S. 2419 different circuits may establish different interpretations of EPA's basic authority to set national air quality standards simply because of a difference in the chemical compound being regulated. For example, when EPA revises the standard for ozone (which would subject hydrocarbon sources to subsequent state regulation) review might be assigned to the Fifth Circuit in which many hydrocarbon sources are located. However, a national ambient standard for sulfur dioxide might be reviewed in one of the circuits covering the Ohio River Valley in which some of the largest concentrations of sulfur dioxide sources are located.

I am not aware of any problems associated with the current venue provisions of the Clean Air Act which are substantial enough to risk introducing the significant problems I have mentioned above. There may be equally serious problems created by S. 2419 with other statute's venue provisions. I respectfully suggest S. 2419 should receive a fuller analysis before it is acted upon by the Senate.

Sincerely,

David G. Hawkins
Senior Attorney

THE BUSINESS ROUNDTABLE STATEMENT ON S. 2419: PROPOSED AMENDMENTS TO THE GENERAL VENUE STATUTES

Legislation has been proposed in the United States Senate to revise several provisions of the law concerning the proper judicial forum in which to bring lawsuits against the federal government and its agencies and officials. The bill, S. 2419, is designed to increase the likelihood that cases involving rulings and actions of the federal government will be heard by a court in a locale where the impact of the case will be felt and not in a forum far removed from the effects of the controversy. It would accomplish that goal by reforming the rules concerning "venue" -- the proper geographic location for trial -- in such cases.

Current venue laws are framed to accommodate the interests of the original parties to the litigation, often to the complete exclusion of the interests of other individuals who may be more substantially affected by the lawsuit than the plaintiffs and defendants themselves. S. 2419 represents an effort to remedy the problem. The Business Roundtable supports the principles of this legislation and, with some suggestions for improving and clarifying the current proposal, recommends its passage.

THE NEED FOR VENUE REFORM

Frequently, a lawsuit challenging the action or decision of a federal government agency or official is a three-cornered controversy. The individual or group bringing the suit claims to be affected by some form of government action or inaction -- such as permitting motor-boating in a wildlife preserve, livestock grazing on public lands, or construction of a water-treatment plant on a navigable waterway. In these cases, the outcome of the suit affects not only the original parties to the case (the private complainants and the government defendant) but a great many people who are not parties to the lawsuit as well. Yet, under current law, their interests are given little or no weight in determining where the proceeding is to be conducted.

Venue laws traditionally have been enacted only to serve the interests of the immediate parties. Venue limitations are generally designed to protect against undue inconvenience to the defendant and are normally enforceable only if the defendant chooses to raise the issue. Even where statutes empower a court, in its discretion, to transfer an action to another district or circuit, see, e.g., 28 U.S.C. §§ 1404(a) and 2112(a), the burden is on the moving party to disturb the plaintiff's choice of a proper venue, and transfer is permitted only to a "district or division where [the action] might have been brought" by the plaintiff or petitioner. Indeed, the major district court venue reform to date, the addition in 1962 of

subsection (e) to 28 U.S.C. § 1391, was designed principally to assure a convenient forum for plaintiffs challenging federal government action.

In short, present venue provisions simply do not adequately take into consideration the interests of persons who are not the original parties. Yet, as a result of political and legal trends, such persons oftentimes are greatly affected by the outcome of a lawsuit that has been tried in a court far removed from their place of residence.

The past decade has witnessed a proliferation of litigation sponsored and conducted by groups that purport to be public interest litigants. Unlike traditional private litigants, the goals and convenience of these public interest litigants do not naturally encourage them to file their suits in a locale whose residents will be affected by the outcome of the suit. Instead, a disproportionate number of these cases tend to be instituted in the federal courts of the District of Columbia. In other instances, actions are filed in the District of Columbia less out of choice than of necessity -- i.e., because it is the only forum in which the case can be brought under current law.

When the impact of litigation is predominantly local in nature and will significantly affect the interests of

individual citizens in a specific geographic area, there are sound reasons why the case should be litigated in that area. First, the lack of a local forum may leave the real parties in interest, those primarily affected by the outcome of the suit, with no formal place in the litigation. Decisions affecting their particular economic or social welfare may be made while they are unaware even that the litigation is in progress. If they learn of it, they face the burden of litigating only at great inconvenience and expense. As a result, their ability to participate in the litigation is impaired, and the court hearing the case is denied arguments and evidence that could significantly increase its understanding of the issues and interests involved.

Second, the venue of a lawsuit directly affecting the local interests of citizens deeply influences their perceptions of the legitimacy and justness of the judicial action. Decisions rendered by courts in the District of Columbia in cases which have little or no impact on the residents of Washington, D.C., but deeply affect the lives of citizens living thousands of miles away, are viewed suspiciously, as an example of unjustified and uninformed federal government intrusion into people's lives. Instead of feeling represented in the decisions affecting them, these citizens

may come to feel that their states are being deprived of a voice in decisions of great local importance. A greater sense of participation in the government's workings results when decisions that affect local interests are made by judges who sit in the areas that are primarily affected by the outcome of the lawsuit.

Third, the present law encourages plaintiffs to shop for a forum whose judges are favorably disposed toward their cause. This situation thwarts a basic principle underlying the establishment of geographically limited federal courts: that localized litigation should be conducted in local federal courts. If any particular judges are better suited than others to decide cases involving problems peculiar to a specific area, those judges are the local judges, who are more familiar with the practical effect of their decisions.

THE BUSINESS ROUNDTABLE'S POSITION ON VENUE REFORM

The Business Roundtable supports venue reform that increases the likelihood that litigation affecting the public will be conducted in a locale where its impact on the public will be felt. Those who will be affected by the outcome of the suit, though not formally named a party by the original litigants, should not be denied a place in the litigation or be forced to participate only at great inconvenience and expense.

At the same time, the Roundtable believes that these objectives can be attained without imposing onerous burdens on the judicial system or interfering with litigation that does not involve matters having a peculiarly local impact.

THE PROPOSED LEGISLATION

The current proposal, S. 2419, addresses questions of venue in cases challenging federal agency action both in the circuit courts of appeals and in the district courts.

Circuit Courts of Appeals -- Transfer of Proceedings

Section 2112 of Title 28 of the United States Code currently allows a circuit court of appeals to transfer a proceeding for the review or enforcement of any agency order, "[f]or the convenience of the parties in the interest of justice," to "any other court of appeals." S. 2419 would add a requirement for the court "upon motion by any party" -- including an intervenor -- to "transfer such proceeding to the court of appeals for a circuit in which the action under review would have a substantially greater impact," unless "the interests of justice" require the court to retain the action or transfer it to a different circuit.

This provision achieves two objectives. First, in all cases where agency action is challenged in a court of appeals, it directs that special consideration be given to the desirability of transferring the case to a locale where the impact of the

agency action is likely to be substantially greater than in the circuit where the case is pending.*/ Second, it is part of a package that provides a more orderly procedure for determining the proper court to hear a challenge to an agency rule when the same rule is challenged in multiple circuits.

Present section 2112 encourages races to the courthouse to challenge agency rules, since it creates a presumption that a case will be heard by the court in which the first petition was filed. S.1080 as passed by the Senate would eliminate the race to the courthouse, by establishing a random selection procedure in such cases. The new proposal builds upon that arrangement and provides for the randomly selected court to determine whether the case should then be transferred to a circuit in which the agency action under review would have a

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*/ Use of the phrase "substantially greater impact" makes it unlikely that the courts will engage in minute and intricately detailed efforts to quantify relative impacts. Unless the choice is quite clear, a court is unlikely to transfer an action under this provision.

substantially greater impact.*/

In effect, the new provision would give the governmental defendant and intervening parties a more substantial voice in the selection of a forum to hear a challenge to an agency rule than under current law. And it will help ensure that more such cases will be heard in a circuit chosen on the neutral ground of substantial local impact.

It should be emphasized that this amendment would not foreclose a court from deciding that the interests of justice require a case to be heard in one circuit even though the action would have a substantially greater impact in another circuit. Nor would it preclude courts from consolidating related proceedings in a single court, as occurs under current law. Finally, it would not affect cases with a generally uniform impact throughout the nation or cases that affect only the party petitioning for review.

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*/ The framers of this provision apparently intended that, when an agency rule is challenged in multiple circuits, only the randomly selected circuit will consider the question whether a transfer should be made to a circuit in which the action would have a substantially greater impact. See 128 Cong. Rec. at S 758 (daily ed. Feb. 10, 1982) (statement of Sen. DeConcini). To make this point clear, the first sentence of proposed subsection 2112(b)(3) might be revised by substituting the phrase "The court in which the record has been filed in a proceeding to review or enforce an agency order under this section" for the phrase beginning "Any court" on page 3, line 16 of the bill and ending with the words "paragraph (1)" on page 3, line 19 of the bill.

Circuit Courts of Appeals -- Nationwide Reviewability of Rules

S. 2419 would add a new subsection 2112(b)(4) to Title 28. This provision would permit any petition for review of agency rules that may be filed directly in a court of appeals to be filed in the judicial circuit in which the person seeking review resides or has his principal place of business. While making no change in the majority of cases, the provision would affect those actions which, under current law, can be filed only in the District of Columbia Circuit. In conjunction with the operation of section 2112 (b)(3), this provision would also ensure that agency rules could be reviewed in a circuit in which the rules would have a substantial impact.

The objective of this amendment is to make it more convenient for members of the public to challenge rules where the rules will be applied. It is not intended to work any radical change in the nature of judicial review proceedings. Petitioners would still have the option of seeking review in the District of Columbia Circuit where permitted under existing law. Nor would the amendment have any effect on existing statutes involving review of adjudications; the amendment applies only to agency "rules" as defined in 5 U.S.C. § 551(4). Finally, the amendment would not affect the division of jurisdiction as between district

courts and courts of appeals, or upset the jurisdictional provisions relating to special courts (such as the Temporary Emergency Court of Appeals or the recently-established Court of Appeals for the Federal Circuit).

Some critics have argued that this amendment will make it more difficult to consolidate multiple challenges to an agency rule in a single court. The argument is without merit. Under present law, multiple actions are regularly consolidated in a single circuit even where jurisdiction in the D.C. Circuit is not exclusive. Sometimes they are consolidated in the District of Columbia, sometimes elsewhere. The only effect of an exclusive jurisdiction provision is to require that the proceedings be consolidated in the District of Columbia. The amendment will give litigants the right to bring suit in a circuit which is more convenient for them. Transfer and consolidation of multiple proceedings will still be possible.

While the Roundtable supports the amendment to open up additional circuits for challenges to agency rules, we believe that section 2112 of Title 28, dealing with certification and filing of the agency record in review proceedings, probably is not the best statutory niche for the provision. A more natural home would be as a new section 2354 of Title 28 (in the chapter dealing with review of orders of federal agencies) or as a new section 1297 (in the chapter on courts of appeals).

District Courts -- Venue

Section 1391(e) of Title 28 of the United States Code is the basic venue provision applicable when the United States or its agencies or officials are named as defendants in cases brought in the federal district courts. It presently provides that venue will lie in any district in which (1) the defendant resides, (2) the cause of action arose, (3) any real property involved is located, or (4) if no real property is involved, the plaintiff resides. In a number of cases, the courts have held that the place where "the cause of action arose" is the place where the administrative action complained of occurred,*/ which in the overwhelming majority of cases will be the District of Columbia. As a result, the community that would be most substantially affected by the challenged agency action will not be a permissible, let alone the required, venue, unless a plaintiff or an official named as a defendant happens to reside there. At the same time, current section 1404(a) of Title 28 authorizes transfers "for the convenience of parties and witnesses, in the interest of justice" only to a "district or division where [the action] might have been brought." (Emphasis added.) Consequently, the possibility of transfer does not overcome the original restrictions on venue.

S. 2419 would make several changes in the venue

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*/ See, e.g., Leroy v. Great Western United Corp., 443 U.S. 173 (1979).

provisions, designed to direct cases challenging agency action to areas in which the residents would be substantially affected.

First, the proposed amendment would limit venue based on the residence of the plaintiff or defendant to those judicial districts whose residents would be "substantially affect[ed]" by "the agency action or failure to act that is the subject of the lawsuit." Second, the "cause of action" for purposes of this venue provision also would be deemed to arise in such a district. In combination, these changes will make it far more likely that a suit challenging an action of the federal government will be filed in one of the districts whose residents would be substantially affected by such action.*/

Opponents of this amendment assert that it will make it difficult, if not impossible, to bring or conduct actions of various sorts. The concern is greatly overstated.

For example, the amendment will make it no more difficult for various affected industries to unite in a single suit opposing an agency rule. Presently, such industry

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*/ It should be noted that this standard does not require the courts to determine which judicial district is the most substantially affected. All that would be required for venue purposes would be a threshold showing that the agency action substantially affects the residents of the judicial district in which the action has been filed. More than one district may satisfy this test.

suits can almost always be brought in the District of Columbia, although as a practical matter, they rarely are. Under the cause of action arose provision of the proposed amendment, such actions could be brought in any district in which the residents will be "substantially affected" by the agency's action. And, if separate suits are filed in different districts under the plaintiff's residency provision, they may be consolidated in a single district under 28 U.S.C. § 1404 -- particularly if the proposed amendment to that section discussed below is adopted.

Nor will the amendment make it more difficult to obtain the presence of witnesses. Live testimony is rare in lawsuits challenging federal agency actions, since the proceeding usually is conducted on the basis of the agency's record. Where live testimony is used, plaintiffs will face the same problems under amended section 1391(e) as they do today in compelling the presence of witnesses outside the district in which the court sits. If the amendment is adopted, the district courts may be able to deal with the problem in those few instances where it arises, as they can today, by transferring the cases in the interest of justice to a district in which the presence of witnesses can be compelled.

Whether the amendment to section 1391(e) will succeed in achieving its objectives is not entirely clear. The uncertainty arises from Rule 12(b) of the Federal Rules of Civil Procedure, which provides that improper venue is waived unless raised in a timely manner by the defendant. Accordingly, a suit challenging agency action might be filed in the District of Columbia, even though the agency action that is the subject of the lawsuit would not substantially affect residents of Washington, D.C. Pursuant to Rule 12(b), if the defendant agency elects not to raise a venue objection, the lawsuit presumably could be heard in the District of Columbia, even though the District of Columbia would not be an appropriate forum under the venue provisions of S.2419.

This same result -- i.e., a failure to dismiss for improper venue -- would likely hold true even if residents of the affected district intervened in the lawsuit, since the general rule is that intervenors do not have standing to object to improper venue.*/ However, under the proposed amendment to 28 U.S.C. § 1404, described below, intervenors would explicitly have standing to move for a transfer of the case to a district "in which the action would have a substantially greater impact." This would go a long way toward curing the problem. Indeed, it emphasizes the importance of the proposed amendment to section

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*/ See Trans World Airlines, Inc. v. CAB, 339 F.2d 56, 63-64 (2d Cir. 1964).

1404. If one is not disposed to rely upon the transfer provision, however, it might be desirable to complement the changes in section 1391(e) with a further amendment that specifically provides intervenors with standing to raise an objection of improper venue.

District Courts -- Transfer of Proceedings

The third principal change, referred to above, involves the district court transfer provision of section 1404(a) of Title 28. That provision currently authorizes the discretionary transfer of a civil action "[f]or the convenience of parties and witnesses in the interest of justice" from one district court to any other district where the action "might have been brought." The proposed amendment would add a new subsection 1404(e), requiring the district courts "upon motion of any party" -- including intervenors -- to transfer "any civil action" against the federal government, a federal agency, or a federal official to a district "where the action might have been brought" and "in which the action would have a substantially greater impact . . . ." The court may nevertheless retain the action or transfer it to a different district court if required

by "the interests of justice."*/

In combination with the amendment of section 1391(e), this provision -- like the proposed amendment to the statute governing transfer of proceedings in the circuit courts of appeals -- would direct the district courts to transfer cases challenging agency action to a district where the impact of the action will be "substantially greater."**/ Under the proposed amendment, local residents who will be affected by the decision will have standing to request a change of venue,***/ and their interests and convenience will be given the importance they merit in selecting the court where the case is to be heard.

This amendment would not alter any current practice in the district courts with respect to actions between

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*/ It seems desirable to revise the wording of this section to track the language of the proposed amendment to section 1391(e). This could be accomplished by substituting the phrase "agency action or failure to act that is the subject of the lawsuit" for the word "action" appearing at the end of line 4 on page 8 of the bill.

**/ As in the case of transfers between the circuit courts of appeals, use of the phrase "substantially greater impact" makes it unlikely that the courts will get bogged down in minute and intricately detailed efforts to quantify relative impacts.

***/ The amendment makes explicit what most courts have assumed -- i.e., that any party (plaintiffs and intervenors, as well as defendants) may move for a change of venue under section 1404. See 15 Wright, Miller & Cooper, Federal Practice & Procedure § 3844 at p. 209 (1976). But see Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976).

private (i.e., non-federal government) litigants. It would not affect the procedures for coordination of multidistrict litigation by the judicial panel on multidistrict litigation under 28 U.S.C. §1407. Nor would it affect cases with a general uniform impact throughout the nation or cases which no party has any interest in transferring.

District Courts -- Notice to States' Attorneys General

Finally, S. 2419 would require plaintiffs filing suit against the United States or its agencies or officials in the District of Columbia to notify the Attorney General of the state or states affected (up to a total of five states) by forwarding them a copy of the complaint. This requirement, to be added as a new section 1391(g), would apply only to an action "of a local environmental nature," defined as one that affects "local or regional interests in one or more contiguous judicial districts" and arises under the federal environmental laws.

This notification procedure is designed to alert the states -- and through them the local communities affected -- to the commencement of litigation affecting them and their citizens. In conjunction with the proposed amendment to the district court transfer statute, this section would enable the states and affected individuals to intervene and move to transfer

the case under 28 U.S.C. § 1404 to a district of substantially greater impact.*/

CONCLUSION

The reform proposals embodied in S. 2419 are designed to make judicial proceedings affecting the public more accessible, convenient, and acceptable to members of the public who will be most substantially affected by the outcome of the litigation. While the new venue rules may require courts to make an additional judgment in some cases when venue is questioned or transfer is sought, the judgment is likely to be much less complicated than some critics of the bill have suggested, and probably no more difficult than the judgment that must be made when transfer is sought under section 1404(a) today. In sum, the Business Roundtable believes that the reforms embodied in S. 2419 will achieve important goals without unduly burdening the courts.

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*/ It can be argued that there is no logical reason to restrict this mechanism to actions arising under the environmental laws, given the absence of any similar restriction in the provisions amending sections 1391(e) and 1404.

CHEMICAL MANUFACTURERS ASSOCIATION

ROBERT A. ROLAND
President

June 10, 1982

The Honorable Alan K. Simpson
Dirksen Senate Office Building
Room 4107
Washington, D.C. 20510

Dear Senator Simpson:

The Chemical Manufacturers Association (CMA) is pleased to submit the enclosed statement for the record in support of S.2419, which would reform venue statutes governing judicial review of federal agency regulatory actions. CMA supports the underlying principle of this bill that litigation should be conducted in federal courts for the areas of the Nation substantially affected by the regulatory actions at issue.

Present venue provisions have allowed, and even facilitated, abuses of this principle. The result has been litigation in distant courts, especially the federal courts for the District of Columbia, over agency actions whose impact fell elsewhere. We believe that S.2419 is a measured response to this problem and will cure the abuses while maintaining the traditional flexibility of federal courts to protect the interests of justice in specific cases.

Sincerely yours,

Enclosure

BEFORE THE COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

STATEMENT OF CHEMICAL MANUFACTURERS' ASSOCIATION

IN SUPPORT OF S. 2419

The Chemical Manufacturers Association (CMA) welcomes the opportunity to submit this statement for the record in support of S. 2419, which would modify current statutes regulating venue for judicial review of federal agency actions. CMA is a non-profit trade organization whose member companies represent more than ninety percent of the productive capacity of basic industrial chemicals within this country. CMA's position in support of S. 2419 is based on the extensive experience gained by CMA and its member companies through participating as parties or intervenors in numerous federal court actions seeking judicial review of federal agency actions or regulations, especially in the environmental health and safety area.

A. The Need for Venue Reform

CMA supports the underlying premise of this bill that litigation over federal agency actions having significantly greater impact on specific areas of the Nation should be resolved in one of the affected areas rather than in some distant court bearing little relationship to the controversy. Congress recognized this principle when it enacted the

Mandamus and Venue Act of 1962 to reverse previous requirements that federal regulatory officials be sued in the District of Columbia as the place of their official residence, but Congress at that time left open the opportunity for such actions to be filed in Washington. Congress could not have envisioned then the extent to which that continuing opportunity would be subjected to abuse by groups bringing suit in D.C. on behalf of their generally limited membership to resolve controversies substantially affecting specific local areas. The proposed bill (S. 2419) is necessary to terminate these abuses.

Numerous suits have been filed in the District of Columbia challenging administrative actions having no relation to D.C. other than the symbolic "residence" in D.C. of the defendant government official. For example, in Cabinet Mountain Wilderness v. Peterson, 510 F. Supp. 1186 (D.D.C. 1981), the court refused to transfer a suit filed in the District of Columbia to challenge the U.S. Forest Service's approval of a private company's mineral exploration program in a wilderness region in northwest Montana.[1/]

1/ Other cases in which judges in the District of Columbia have denied motions to transfer cases to areas more closely connected with the controversy include Environmental Defense Fund v. Costle, 12 Env't Rep. Cas. (BNA) 1001 (D.D.C. 1978) (salinity level of Colorado River), aff'd, 12 Env't Rep. Cas. (BNA) 1255 (D.C. Cir. 1978); National Wildlife Federation v. Andrus, No. 78-1522 (D.D.C. 1978) (water project for Denver Area); and Defenders of Wildlife v. Andrus, 455 F. Supp. 446 (D.D.C. 1978) (litigation over boating on Ruby Lake in Nevada).

The D.C. federal courts have been willing to transfer some cases.[2/] In many more cases, however, suits with little relationship to the District of Columbia have remained in that forum. For example, suits have been filed in D.C challenging: the legality of a powerplant under construction at the Navajo Dam on the San Juan River in New Mexico;[3/] the construction of the Garrison Diversion Unit of the Pick-Sloan Missouri River Basin Project in North Dakota;[4/] an agency decision respecting the height of the Ross Dam on the Skagit

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2/ For example, in National Wildlife Federation v. Alexander, 458 F. Supp. 29 (D.D.C. 1978), the court transferred to South Carolina a suit filed in the District of Columbia to challenge issuance of a permit authorizing construction of a port terminal on the Wando River near Charleston, South Carolina.

Other cases in which judges have transferred cases from the District of Columbia to areas more closely connected with the controversy include Salt River Pima-Maricopa Indian Community v. Watt, Civ. Action No. 82-145 (D.D.C. Apr. 27, 1982) (water rights litigation concerning administration of Salt River Project in Arizona); Southern California Ass'n of Governments v. Kleppe, 413 F. Supp. 563 (D.D.C. 1976)) (litigation over oil leasing off California coast); Canal Authority v. Callaway, 489 F.2d 567 (5th Cir. 1974) (Judicial Panel on Multidistrict Litigation ordered suit filed in D.C. concerning Cross Florida Barge Canal transferred to Florida for consolidation with other actions); Environmental Defense Fund v. Hoffman, Civil Action No. 76-2204 (D.D.C. Nov. 30, 1976) (litigation concerning Tennessee-Tombigbee waterway); and National Preservation Law Center v. Landrieu, 14 Env't Rep. Cas. (BNA) 1626 (D.D.C. 1980) (litigation over construction of convention center in historical area of Charleston, S.C.).

3/ National Wildlife Federation v. Andrus, 440 F. Supp. 1245 (D.D.C. 1977).

4/ National Audubon Society v. Andrus, 442 F. Supp. 42 (D.D.C. 1977).

River in Washington State;[5/] and the Defense Department's program to destroy blackbirds on two military bases and in three counties of Kentucky and Tennessee.[6/] Although other parties did intervene in some of these cases without moving for transfer, there is no way of knowing how many other local parties might have wished to intervene and move for transfer, but were unaware of the suit until after a decision was rendered by the district court.

Even among opponents of this legislation, there has been little disagreement with the premise that the local

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5/ Swinomish Tribal Community v. Federal Energy Regulatory Comm'n, 627 F.2d 499 (D.C. Cir. 1980).

6/ Society for Animal Rights v. Schlesinger, 512 F.2d 915 (D.C. Cir. 1975).

Other cases of local impact filed in the District of Columbia federal courts include Sierra Club v. Andrus, 487 F. Supp. 443 (D.D.C. 1980) (litigation over water rights in Utah and Arizona); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1973) (challenge to water allocation in Nevada); Natural Resources Defense Council v. Morton, 388 F. Supp. 829 (D.D.C. 1974) (National Environmental Policy Act challenge to policies respecting grazing on national resource lands in eleven Western states); North Slope Borough v. Andrus, 486 F. Supp. 332 (D.D.C.) (suit filed in District of Columbia to prevent lease sale of federal properties with oil and gas potential off the north coast of Alaska), aff'd in part, rev'd in part, 642 F.2d 589 (D.C. Cir. 1980); Sierra Club v. Morton, 421 F. Supp. 638 (D.D.C. 1974) (suit filed in District of Columbia challenging development of coal resources in Northern Great Plains), rev'd, 514 F.2d 856 (D.C. Cir.), rev'd, 427 U.S. 390 (1976); Sierra Club v. Interstate Commerce Comm'n, 1978 Federal Carriers Cases (CCH) ¶ 82,768 (D.C. Cir. Feb. 21, 1978) (petition filed in D.C. Circuit to challenge sufficiency of environmental impact statement regarding the construction of a rail line in the Powder River Basin of Wyoming); and National Wildlife Federation v. Burford, Civil Action No. 82-1166 (D.D.C. filed Apr. 27, 1982) (suit filed in district court in D.C. to enjoin sale of federal coal leases in Powder River Coal Region of Montana and Wyoming).

impact of federal agency actions should be considered in deciding what court should hear an action for judicial review.[7/] Yet some courts have refused to give weight to such considerations. Moreover, as was noted during the hearings on S. 2419, intervenors may be precluded under present law from raising objections to venue.[8/]

Accordingly, legislation is both appropriate and necessary to admonish litigants that Congress does not condone

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7/ Yost, Present Venue Provisions--Flexibility v. Inconvenience in Venue at the Crossroads 31, 33, 63 (Nat'l Legal Center for the Public Interest 1982); Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982)(statement of Nicholas C. Yost)("Local factors are now appropriate subjects for consideration in venue selection. . . . I don't believe that all or even most cases ought to be tried in Washington. What I do believe is that the process of venue selection should remain responsive to the variety of interests which time has shown to be relevent, and not just one of them."); id. (testimony of Professor Ernest Gellhorn) ("I would think it is correct to assert that local interests are important and ought to be considered in the location of the case."); id. (testimony of Professor Cass R. Sunstein)("Also I support the conception underlying this bill to the effect that the case ought to be transferred if there is a genuine local impact, a distinctively local impact, and if the interests of the defendant and the intervenors call for transfer. I think that's correct.").

8/ Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982)(testimony of Professor Ernest Gellhorn). See Trans World Airlines, Inc. v. Civil Aeronautics Board, 339 F.2d 56, 63-64 (2d Cir. 1964), cert. denied, 382 U.S. 842 (1965); Commonwealth Edison Co. v. Train, 71 F.R.D. 391 (N.D. Ill. 1976). See generally 7A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 1918 (1972); 3B Moore's Federal Practice § 24.19 (2d ed. 1982). In practice there are cases in which the federal courts in the District of Columbia have permitted intervenors to move for transfer of venue, at least where no argument was raised concerning the intervenor's ability to make the motion. The intervenor's right to move for transfer of venue under current law is therefore at best uncertain.

filing federal suits of particularly local impact in distant forums, to offer more explicit guidance to judges respecting the resolution of motions to transfer such suits, and to broaden the opportunity for persons from a local area affected by the suit to intervene and petition for transfer. S. 2419 would accomplish all of these objectives.

B. This Bill Will Correct the Abuses While Preserving the Flexibility of Present Venue Laws.

Initially, S. 2419 will revise the venue provisions of 28 U.S.C. § 1391(e) to make them less susceptible to these abuses by providing that suits should not be filed in federal district courts for areas which will not be affected by the agency action under review. In addition, S. 2419 provides a new district court transfer provision in 28 U.S.C. § 1404(e) to allow defendants and intervenors to correct a plaintiff's selection of an inappropriate court.

A similar transfer provision is included for circuit courts along with the random selection system to eliminate races to the courthouse as the basis for deciding which circuit court will hear challenges to agency action when multiple parties file in different courts. To make this provision effective, however, it is necessary to eliminate the exclusive review provisions of several statutes that would otherwise force all cases to be heard in the District of Columbia Circuit regardless of the local impact of agency action.

We believe that S. 2419 is a balanced and moderate response to the need for venue reform. In contrast to previous bills on this subject, S. 2419 provides for transfer only if an initial party or intervenor moves for transfer, and permits the court to transfer or retain the suit for reasons other than local impact if the "interests of justice" so require. This approach of limiting transfers to instances in which an initial party or an intervenor moves for transfer is a reasonable accommodation of the traditional principle that objections to venue may be waived.9/

CMA is concerned, however, that the "interests of justice" provision has a potential for abuse by parties seeking to avoid the bill's clear intent. For example, the convenience of proximity to an agency's Washington headquarters should not be a factor in determining the interests of justice. Nevertheless, we agree that there is a need for an "interests of justice" provision to accommodate unusual cases in which transfer to an area of significantly greater impact would work some exceptional hardship. Accordingly, we urge that the statute, or at least the legislative history, should clarify what factors are appropriate for considerations by the courts in discerning the "interests of justice."

Although the bill's transfer provisions in some instances would restrict the ability of a CMA member to sue in its

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9/ 15 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §§ 3826, 3829 (1976).

state of incorporation or principal place of business, we believe that it is generally appropriate to encourage suits to be filed in the judicial districts where residents are particularly affected by challenged agency action, and to provide for transfer to such a district on motion of a party or intervenor. If, for example, one of our member companies has a plant in California that is particularly affected by an agency regulation, venue for a challenge to that action should be proper in California. Under current law, venue might be proper only in the District of Columbia (the "residence" of the federal agency defendant) or in the corporation's state of incorporation or principal place of business. None of these currently available forums may have a very close relationship to the actual substance of the controversy. Indeed, current statutes permit challenges to certain types of agency rules only in the District of Columbia, no matter what the dispute is about or the plaintiff's inconvenience in suing in D.C.

C. Arguments Raised in Opposition to S. 2419 Generally Are Misplaced or Unfounded.

Venue reform such as would be provided by S. 2419 has been under consideration for several years. This bill and previous proposals have generated thoughtful discussion of the issues as well as some opposition. Although S. 2419 clearly resolves many of the problems raised in opposition to previous bills, many of the same arguments have been

advanced in opposition to this bill. A number of these arguments appear to be based on a misunderstanding of the bill or the intent of its sponsors.

Several opponents have implied that the bill is unnecessary because most cases to which the federal govenment is a defendant are filed outside of the District of Columbia.[10/] The concerns addressed by this bill, however, do not result from a numerical calculation. Rather, it is sufficient that a significant number of cases have been brought and litigated in courts far distant from the areas substantially affected by the agency action in question.[11/] And these

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10/ Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982) (testimony and written statement of Nicholas C. Yost); id. (testimony and written statement of Professor Cass R. Sustein). We recognize that these persons were responding to arguments that proponents of similar bills have advanced in the past.

11/ Additionally, to the extent that questions respecting the numerical concentration of cases in the District of Columbia federal courts are relevant at all, it must be noted that the D.C. Circuit does handle a disproportionate amount of certain important classes of administrative litigation. For example, in the twelve month period ending June 30, 1981, more petitions to review agency actions filed in the U.S. Courts of Appeals were filed in the D.C. Circuit than in any other Circuit (851 out of 3,800). The D.C. Circuit had 231 out of the 383 Environmental Protection Agency cases filed during this period, 106 of 131 Federal Communications Commission cases, 111 of 258 Interstate Commerce Commission cases, 105 of 317 Federal Energy Regulatory Commission cases, 15 of 25 Nuclear Regulatory Commission cases, and 19 of 38 Department of Energy cases. 1981 Annual Report of the Director of the Administrative Office of U.S. Courts, at 49, Table 5. Moreover, the District of Columbia Circuit of course hears all cases under the twenty statutory provisions that provide review exclusively in the District of Columbia Circuit.

cases continue to be filed at the present.12/

Arguments that administrative cases should be channeled particularly into the D.C. Circuit because that Circuit has a special "expertise" in administrative law are taking advantage of historical accident. Prior to 1962 this argument probably was valid because the venue laws generally forced all such cases into the D.C. federal courts. Since the 1962 venue revisions have permitted suits against administrative agencies to be brought outside of the District of Columbia, however, courts throughout the country have become increasingly familiar with principles of administrative law. Indeed, it is noteworthy that contentions that the D.C. federal courts have a special expertise in administrative law are undercut by opponents' observations that more administrative litigation is filed outside of D.C. than within it.

Assertions that the bill makes local impact the only factor to be considered by a court to the exclusion of all

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12/ National Wildlife Federation v. Burford, Civil Action No. 82-1166 (D.D.C. filed Apr. 27, 1982) (suit filed in district court in D.C. to enjoin sale of federal coal leases in Powder River Coal Region of Montana and Wyoming); Cheyenne-Arapaho Tribes v. Watt, Civil Action No. 82-1091 (filed Apr. 21, 1982) (petition filed in district court in D.C. for injunction against closing an off-reservation boarding school in Oklahoma), preliminary injunction granted (D.D.C. May 17, 1982).

other factors[13/] are simply erroneous. The bill offers judges guidance, as it should, in stressing local impact as the concern most important to Congress, but S. 2419 explicitly entrusts the judges with discretion to transfer or retain cases for other reasons if the "interests of justice" so require.

Critics also have argued that the bill should not be passed because its operative language (e.g., "substantially affected," "substantially greater impact") is too vague. This vagueness, they assert, will lead to wasteful preliminary litigation over the applicability of the bill's terms to particular cases. Although we would not object to further clarification of the bill's meaning either through a rewording of the bill or through further legislative history, we do not believe that the bill's current language is vague.[14/]

13/ Hearing on S. 2419 Before the Senate Comm. on the Judiciary (May 13, 1982) (testimony and written statement of Nicholas C. Yost).

14/ Indeed, we note that many of the same opponents who criticize the present language as vague have recommended that section 1404 be amended instead to specify "local interest" as one of the factors to be considered by the courts. See Yost, supra note 7, at 63; Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982) (testimony of Professor Ernest Gellhorn suggesting that sections 1391(e) and 1404(a) be revised to list as one factor whether the action has a "substantially local interest"). This proposal strikes us as being far more likely to generate threshold litigation over uncertainties in statutory language. Moreover, this proposal appears to invite courts to engage in even broader inquiries into the relative extent of local impact for agency action with little or no guidance on how to resolve those inquiries.

We believe that the legislative history already surrounding the bill,[15/] and the comments of the bill's sponsors during the Committee hearing, give the courts fairly clear direction respecting what types of cases this legislation is intended to govern and how it is intended to operate. Indeed, the bill, with its accompanying legislative history, offers courts substantially clearer guidance than the current statute, which authorizes courts to transfer "for the convenience of parties and witnesses, in the interests of justice" with no indication concerning what factors constitute the "interests of justice" or which of conflicting factors should be given predominant weight.

Furthermore, the argument that the bill will create a new kind of threshold litigation has a hollow ring because, as many critics have recognized and some critics have stressed, courts already consider (or should consider) whether cases are of local concern in ruling on transfer motions.[16/] If

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15/ See 128 Cong. Rec. S755 (daily ed. Feb. 10, 1982) (statement of Senator DeConcini introducing venue amendment to S. 1080); 128 Cong. Rec. S3789, S3790 (daily ed. Apr. 21, 1982) (statement of Senator DeConcini incorporating previous statement by reference as statement of purpose and background of S. 2419).

16/ See Yost, supra note 7, at 33, 37, 45-46; Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982) (testimony of Nicholas C. Yost quoting Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 509 (1947), as holding that local factors are now appropriate subjects for consideration in venue selection); id. (testimony of Robert Blacher that attempts to file cases in the District of Columbia that really only affect another local area are largely unsuccessful because the federal judges in the District of Columbia will transfer such cases). See also cases cited supra note 2.

courts already make similar determinations without any statutory guidance, it is difficult to see why the inquiry will become more difficult when directed by statute.

Those posing hypothetical situations in which it would be difficult to evaluate precisely which of several localities is most substantially affected appear to have misread both the bill's language and its sponsor's statement. As we understand the bill, courts are not directed to draw fine qualitative and quantitative distinctions between different types of impact, but to transfer the case to one of the districts or circuits in which the agency action has a substantially greater impact than the forum in which the plaintiff has filed suit.[17/]

It may be difficult to decide whether a government decision to kill blackbirds in Kentucky and Tennessee[18/] has a greater impact in one state or the other (and, as we read the bill, a transferor court need not draw such a fine distinction), but it is patent that the suit has a substantially greater impact in one of these areas than in the District of Columbia. Moreover, if the impact of a regulation is truly uniform nationwide, our understanding is that

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17/ 128 Cong. Rec. S756, S758 (daily ed. Feb. 10, 1982) (Statement of Senator DeConcini).

18/ The facts are drawn from Society for Animal Rights v. Schlesinger, 512 F.2d 915 (D.C. Cir. 1975) (appeal of suit filed in district court in the District of Columbia).

venue would be appropriate in any affected district, including the District of Columbia, and that the special transfer provisions simply would not come into play.19/

Some persons have also suggested that the bill requires transfer to an area of substantially greater impact even if all original parties to the suit and all intervenors are pleased with the forum chosen by the plaintiff. It should be stressed, however, that S. 2419 does not require transfer in every case: it provides transfer only if one of the original parties to the suit, or an intervenor, objects to venue and moves for transfer. Thus, fears that the bill will require transfer even if all participants in the litigation are satisfied with the current forum are not realistic.

Moreover, some criticism of the bill may have incorrectly conveyed a picture of third party intervenors as persons with no substantial interest in the controversy. In fact, persons are permitted to intervene largely because they will be affected by the resolution of the controversy. Indeed, in light of the broad test for standing that has evolved to support citizen challenges to administrative action,20/ intervenors often have as concrete a stake in the outcome of a suit as has the original plaintiff.

19/ 128 Cong. Rec. S757, S758 (daily ed. Feb. 10, 1982) (Statement of Senator DeConcini).

20/ See, e.g., Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970); Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669 (1973).

An argument has been made that the bill may increase the number of cases in absolute terms because companies may have to challenge the same "nationwide" regulation in different areas in which they are located "instead of being able to unite in a single suit in the Nation's capital."[21/] This argument overlooks the following points: (1) in the case of statutes now placing venue exclusively in the D.C. Circuit, the bill maintains the plaintiffs' ability to sue in that court in addition to other courts; (2) in district court litigation, plaintiffs from anywhere could join to sue in the same area of local impact, just as now plaintiffs from anywhere can sue in the District of Columbia; (3) a court could transfer cases "in the interest of justice" for consolidation with related challenges to the same agency regulation; (4) if the challenged agency rule is truly of "nationwide" impact, venue will be available under the newly defined "cause of action arose" provision of 1391(e) in the District of Columbia as well as other circuits, because the regulation will affect the residents of the District of Columbia as substantially as it affects the residents of any other area; and (5) if multiple petitions are filed in different circuits with respect to an agency rule reviewable in the courts of appeals, the bill provides a random selection

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21/ Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982) (written statement of Nicholas C. Yost).

mechanism for transferring the cases to a single forum. In short, this argument is inapplicable to S. 2419.

Arguments that the bill may leave a plaintiff with no proper forum erroneously presume that section 1404 "affords no relief, because the forums to which a matter might be transferred all demand a 'substantially greater impact.'"[22/] In fact, the bill's amendment to section 1404 provides for transfer or retention in the "interests of justice" irrespective of local impact. The need for at least one forum in which a suit properly can be brought certainly would appear to justify transfer "in the interests of justice." Thus, in those very rare cases in which obtaining venue against both an agency and a private defendant would be problematical, at the very worst the plaintiff could file two suits and have the suit against the federal defendant transferred "in the interests of justice" for consolidation with the other suit.

Finally, we believe that the arguments concerning the increased costs to the government and to certain plaintiffs of litigating administrative cases in forums other than D.C. do not present compelling reasons for not passing the bill. Ultimately, of course, whether the benefits of having cases heard in the local area affected are worth the increased cost to certain litigants is simply a value judgment respecting which reasonable people may differ. We believe, however,

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22/ Id.

that the bill's opponents may have overestimated the potential costs of the bill in a number of respects.

First, increased travel expenses for attorneys may be overstated. The United States government has attorneys in all areas of the country to try its cases. Special interest or trade groups who choose to maintain their headquarters in the District of Columbia may hire local counsel in other areas, when necessary, and may effectively participate by correspondence with local counsel in the preparation of briefs and motions.

Second, the cost of producing witnesses if the forum is not D.C. appears exaggerated. Most administrative litigation does not require the calling of live witnesses, government officials or otherwise; it rather involves judicial review of an administrative record that has already been created. Motions are usually supported by affidavit, not live testimony, and in rare cases when a trial must be had to resolve disputed issues of fact, the deposition of a distant witness may usually be introduced in lieu of producing the witness. If witnesses are necessary, they are as likely to be persons from the local area affected by the regulation as an official responsible for its promulgation, depending upon the nature of the litigation. In extreme cases of government witnesses being indispensable, but otherwise unavailable, a court presumably could transfer "in the interests of justice."

Finally, arguments that S. 2419 will substantially increase costs to the government and to certain plaintiffs

are largely inconsistent with arguments that the bill is unnecessary because courts already transfer appropriate cases to areas of local impact. The need for the bill has been criticized on the basis that District of Columbia courts already transfer cases with a predominant impact in another local area to a court in that area, and that public interest groups seldom file such cases in the District of Columbia but rather routinely file such cases in the local area affected.23/ It stands to reason that if courts are already transferring such cases, and if plaintiff groups already bring these suits in one of the affected local areas rather than in the District of Columbia, the bill will not substantially change current practice and will not dramatically increase the costs to these groups of litigating such cases. If, on the other hand, courts are not currently transferring suits with a predominant local impact in another area, or if citizens organizations are filing many such suits in the District of Columbia although the suit addresses local impacts hundreds or thousands of miles away, the need for this legislation may be sufficiently great that added costs to particular plaintiff groups should not be deemed to outweigh the salutary purposes of the bill.

23/ Hearing on S. 2419 Before the Senate Comm. on the Judiciary, 97th Cong., 2d Sess. (May 13, 1982) (testimony and written statement of Robert Blacher).

CONCLUSION

In conclusion, the Chemical Manufacturers Association believes that S. 2419 represents a moderate and balanced solution to a very real concern. We believe that many of the criticisms addressed to S. 2419, however appropriate they may have been to previous venue reform bills, are not serious problems with respect to the current bill. We urge Congress to enact S. 2419.

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